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No. 2344

United States
Circuit Court of Appeals

For the Ninth Circuit.

J. B. POWER, as Trustee in Bankruptcy of the
Estate of DANIEL FUHRMAN, Bankrupt,
Petitioner,

vs.

RAY FUHRMAN,

Respondent.

In the Matter of DANIEL FUHRMAN, Bankrupt.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, a Certain Order of the United States
District Court for the Western
District of Washington,
Northern Division.

FILED
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No.—

In the Matter of DANIEL FUHRMAN, Bankrupt.
Petition for Review.

To the Honorable, The Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, J. B. Power, respectfully shows:

That there is pending in the District Court of the United States for the Western District of Washington, Northern Division, a proceeding in bankruptcy wherein Daniel Fuhrman was adjudged bankrupt, and your petitioner was duly elected trustee of said bankrupt estate, and, during all the times hereinafter mentioned, your petitioner did act and does now act as the trustee of said bankrupt estate.

That in the course of said bankruptcy proceeding your petitioner, as trustee, filed a petition in the office of the Honorable John P. Hoyt, Referee in Bankruptcy, to whom said bankrupt estate had been referred to for administration, praying for an order upon the said Daniel Fuhrman, bankrupt and Ray Fuhrman, his wife, to turn over to your petitioner as trustee the sum of TWENTY-FOUR THOUSAND DOLLARS, cash belonging to the estate of said bankrupt, and which sum, it was alleged in said petition, the said bankrupt and his wife had in their possession and control and were fraudulently concealing and withholding from the said trustee. That

said petition came on for hearing in due course, and such hearing resulted, on February 25, 1913, in a finding by the said referee that the said bankrupt and his wife, at all times during said proceeding and at the time of the making of such finding had in their possession and control the sum of NINE THOUSAND DOLLARS, in cash, belonging to said estate in bankruptcy, which sum the said parties had concealed and withheld and were then concealing and withholding from the trustee, and, the referee in bankruptcy further found that beyond all reasonable doubt the said Daniel Fuhrman and his wife had the present ability to comply with the order of the Court with respect to the payment of said sum, and, thereupon, the said referee entered an order requiring the said Daniel Fuhrman and Ray Fuhrman, his wife, within ten days after the date of the entry of such order, to pay to your petitioner as trustee said sum of NINE THOUSAND DOLLARS in cash, which the Court found to be in their possession and under their control.

That thereafter upon the petition of said bankrupt and his wife, said finding and order of the referee were certified to the District Judge for review, and, upon such review, the District Judge rendered a decision on July 21, 1913, affirming the finding and order of the referee in all respects, and, on the 23d day of July, 1913, the District Judge made and entered an order confirming such ruling in all things, and, by said order, directed and ordered the said Daniel Fuhrman, bankrupt, and Ray Fuhrman, his wife, on or before the 31st day of July, 1913, to pay

to the said trustee in bankruptcy the sum of NINE THOUSAND DOLLARS, in cash, belonging to said estate in bankruptcy, and which said District Judge further found to be in their possession and control.

That said Daniel Fuhrman and Ray Fuhrman having neglected and failed to comply with said order, proceedings were instituted by your petitioner, as trustee, to cause said Daniel Fuhrman and Ray Fuhrman to be attached and punished for contempt for having wilfully and contemptuously disobeyed said order, and, upon the trial of said last mentioned proceeding, the District Court made and entered findings of fact and conclusions of law, under date of October 17, 1913, adverse to the contention of the trustee, and, under date of November 3, 1913, said District Court made and entered an order discharging the said Ray Fuhrman from the order to show cause why she should not be attached and punished for contempt.

Your petitioner further shows that the said District Court committed error in making certain of the findings of fact and conclusions of law hereinbefore referred to as having been made on the 17th day of October, 1913, so far as the same referred to said Ray Fuhrman, and, erred in making the order dismissing said contempt proceeding as against said Ray Fuhrman.

All of the foregoing facts will be made to appear to your Honors by a transcript of so much of the record in the above-mentioned bankruptcy proceeding as may be necessary to exhibit and explain the

manner and form in which the questions of law set forth in this petition arose and were determined, which transcript will be transmitted to this court.

WHEREFORE your petitioner respectfully prays that such order and judgment of the said District Court, as is herein complained of, may be reviewed and revised by your Honors according to the merits of your petitioner's contentions, in accordance with the provisions of the law regulating such proceedings, as are herein set forth, and that by the order and decree of this Court the said order and judgment of the District Court be reversed, and said District Court directed to hold that the said Ray Fuhrman has been guilty of contempt and should be punished for having wilfully and contemptuously disobeyed the order of the District Court entered on July 23, 1913, directing her to pay over to your petitioner, as trustee, the sum of NINE THOUSAND DOLLARS, in cash, belonging to said estate in bankruptcy.

YOUR PETITIONER FURTHER PRAYS for such other and further relief as the facts in this matter suggest and which to your Honors seems meet.

LEOPOLD M. STERN,

Attorney for Petitioner.

United States of America,
State of Washington,
County of King,—ss.

J. B. Power, being first duly sworn, upon his oath deposes and says that he is the trustee in bankruptcy of Daniel Fuhrman, bankrupt in the proceeding in bankruptcy referred to in the foregoing petition; that he has read the foregoing petition for re-

view, and knows the contents thereof, and that the matters and things therein contained and set forth are true.

J. B. POWER,

Subscribed and sworn to before me this 18th day of November, 1913, at Seattle, Washington.

[Seal]

C. L. BUTCHER,

Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: No.—. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Daniel Fuhrman, Bankrupt. Petition of J. B. Power, as Trustee in Bankruptcy of Daniel Fuhrman, Bankrupt, for Review. Original.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —

In the Matter of DANIEL FUHRMAN, Bankrupt.

Notice of Filing of Petition for Review.

To Ray Fuhrman, Respondent, and to E. H. Guie,
Respondent's Attorney:

You, and each of you, are hereby notified that on the 24th day of November, 1913, at the hour of ten o'clock in the forenoon of said day, I will file in the Clerk's office for the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, California, the petition for review in the above-entitled cause, a copy of which petition is hereto attached as a part of this notice, and I will then ask to

have the case docketed and the necessary order made thereon to have such case set down for hearing.

LEOPOLD M. STERN,

Attorney for Petitioner.

I hereby acknowledge receipt of a copy of the Petition of J. B. Power, trustee in bankruptcy of Daniel Fuhrman, bankrupt, for review herein, and of notice thereof, and the service of same this 18th day of November, 1913.

E. H. GUIE,

Attorney for Ray Fuhrman, Respondent.

[Endorsed]: No.— In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Daniel Fuhrman, Bankrupt. Notice of Filing of Petition for Review, and Acknowledgment of Service. Original.

Names and Addresses of Counsel.

LEOPOLD M. STERN, Esq., Attorney for Trustee
and Appellant,

705 Lowman Building, Seattle, Washington.

E. H. GUIE, Esq., Attorney for Bankrupt,

810 Leary Building, Seattle, Washington [3*]

*Page number appearing at foot of page of original certified Record.

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 4983.

In the Matter of DANIEL FUHRMAN, Bankrupt.
**Order Directing Daniel Fuhrman, Bankrupt, and
Ray Fuhrman to Turn Over Concealed Assets.**

J. B. POWER, the trustee herein, having filed a petition praying for an order upon Daniel Fuhrman, bankrupt above named, and Ray Fuhrman, his wife, to turn over to the said petitioner, as trustee, the sum of TWENTY-FOUR THOUSAND DOLLARS cash belonging to the estate of said bankrupt alleged to be in possession of and under the control of said bankrupt and his wife, Ray Fuhrman, and which the said Daniel Fuhrman, bankrupt, and his wife, Ray Fuhrman, are fraudulently concealing and withholding from the said trustee, and the said Daniel Fuhrman, bankrupt, and his said wife, Ray Fuhrman, having filed their verified answer to said petition, and the matter having been duly heard and testimony taken, the undersigned referee in bankruptcy FINDS:

That the undersigned referee is satisfied beyond all reasonable doubt that at the time of the filing of said petition by the trustee, and ever since, and at the present time, said Daniel Fuhrman, bankrupt, and his wife, Ray Fuhrman, had, and now have, in their possession and under their control, the sum of NINE THOUSAND (\$9,000.00) in cash, belonging

to said estate in bankruptcy, which sum, the said Daniel Fuhrman, bankrupt, and Ray Fuhrman, his wife, have concealed and withheld, and now conceal and withhold from the trustee herein. [4]

And the undersigned referee in bankruptcy is satisfied beyond all reasonable doubt of the present ability of the said Daniel Fuhrman, bankrupt, and his said wife, Ray Fuhrman, to comply with the order of this Court herein made.

WHEREFORE, IT IS ORDERED that the said Daniel Fuhrman, bankrupt, and Ray Fuhrman, his wife, within ten days after the date of the entry of this order, PAY to J. B. Power, the trustee in bankruptcy herein, the sum of NINE THOUSAND DOLLARS (\$9,000.00) cash, belonging to the said estate in bankruptcy, and which this Court finds to be now in their possession and under their control.

Entered in open court this 25th day of February, 1913, at Seattle, Washington.

JOHN P. HOYT,
Referee in Bankruptcy.

[Endorsed]: Order Directing Daniel Fuhrman and Ray Fuhrman to Turn Over Concealed Assets. Filed in the United States District Court, Western Dist. of Washington, Mar. 8th, 1913. Frank L. Crosby, Clerk. Filed Feb. 25th, 1913, 2 P. M. John P. Hoyt, Referee. [5]

[Opinion.]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 4983.

In the Matter of DANIEL FUHRMAN, Bankrupt.

Filed July 21, 1913.

LEOPOLD M. STERN, for Trustee.

E. H. GUIE, for Bankrupt.

CUSHMAN, District Judge.

This matter is before the Court upon the petition of the bankrupts for review of an order of the Referee, directing them, within ten days after the date of the entry of the order, to pay to the trustee in bankruptcy Nine Thousand Dollars in cash, belonging to the estate in bankruptcy and under their control. The referee finds:

“That the undersigned referee is satisfied beyond all reasonable doubt that at the time of the filing of said petition by the trustee, and ever since, and at the present time, said Daniel Fuhrman, bankrupt, and his wife, Ray Fuhrman, had, and now have, in their possession and under their control, the sum of NINE THOUSAND (\$9,000.000) in cash, belonging to said estate in bankruptcy, which sum, the said Daniel Fuhrman, bankrupt, and Ray Fuhrman, his wife, have concealed and withheld, and now conceal and withhold from the trustee herein.

“And the undersigned referee in bankruptcy is satisfied beyond all reasonable doubt of the present

ability of the said Daniel Fuhrman, bankrupt, and his said wife, Ray Fuhrman, to comply with the order of this Court herein made.”

The bankrupts, in their petition, assign as errors:

“(a) Said Referee erred in not sustaining the demurrer of Ray Fuhrman to said petition and in overruling the same and requiring her to answer.
[6]

“(b) Said Referee erred in finding that at the time of the filing of said petition by the Trustee, or at any other time these petitioners had the sum of \$9,000.00 or any other sum whatsoever belonging to said estate in their possession or under their control, and in finding that they have concealed or withheld and that they are now concealing or withholding any moneys whatsoever belonging to said estate.

“(c) Said Referee erred in holding that these petitioners have the present ability to pay the sum of \$9,000.00 or any other sum to said Trustee.

“(d) That said Referee erred in directing these petitioners to pay the said Trustee the sum of \$9,000.00 or any other sum.”

The petition of the trustee, on which the referee heard this matter, alleges:

“That he is the duly appointed, qualified and acting trustee in bankruptcy of the estate of Daniel Fuhrman, bankrupt, in the above-entitled proceeding.

“That Ray Fuhrman is the wife of said Daniel Fuhrman.

“That said bankrupt and his wife, Ray Fuhrman, have in their possession and under their control the

following property belonging to said estate in bankruptcy:

TWENTY-FOUR THOUSAND DOLLARS,
CASH.

“That the said bankrupt, Daniel Fuhrman, and his wife, the said Ray Fuhrman are fraudulently concealing and withholding said money, to wit, Twenty-four Thousand Dollars, Cash, from the possession of your petitioner, as trustee in said bankrupt estate.”

No error is found in the action of the referee in overruling the demurrer. It appears that the Court had jurisdiction of the defendant, Ray Fuhrman; of the subject matter of the petition, and that the facts stated were sufficient to warrant the relief prayed.

Upon the hearing before the referee, a large amount of testimony was submitted to the Referee upon the questions involved and determined. A review or analysis of the evidence is not deemed necessary. There was ample testimony to support the findings and order of the referee and the same are, in all things, confirmed, save that, as the time allowed the bankrupts in the Referee's order, to comply therewith, has [7] expired, the order is now modified to read “on or before July 31st,” instead of “within ten days after the date of the entry of this order,” as recited in the order reviewed.

[Endorsed]: Decision on Review. Filed U. S. District Court Western District of Washington Jul. 21, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [8]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 4983.

In the Matter of DANIEL FUHRMAN, Bankrupt.
**Order Confirming Ruling of Referee and Direct-
ing Payment of Money to Trustee.**

IN THIS PROCEEDING, the Honorable JOHN P. HOYT, Referee in Bankruptcy, having, on the 25th day of February, 1913, entered an order herein directing Daniel Fuhrman, the bankrupt, and Ray Fuhrman, his wife, to pay to J. B. Power, the trustee in bankruptcy in this proceeding, within ten days, the sum of Nine Thousand Dollars, cash, belonging to said estate in bankruptcy, and which the said referee found to be then in the possession and under the control of the said Daniel Fuhrman, bankrupt, and Ray Fuhrman, his wife,—

AND, the said parties having caused said order and proceeding to be certified to this court for review, and said petition for review having been duly argued before this court by E. H. Guie, on behalf of said bankrupt and his wife, and by Leopold M. Stern, on behalf of the trustee, and having been duly considered by this court and taken under advisement; and this court having rendered its memorandum decision herein on the 21st day of July, 1913, confirming the order of said referee in all things, saving the time allowed the said bankrupt and his wife to comply with the referee's order,—

NOW, THEREFORE, IT IS HEREBY ORDERED that the decision and order of the Referee entered herein on the 25th day of [9] February, 1913, and hereinabove referred to, BE AND THE SAME HEREBY IS in all respects approved and confirmed, saving and excepting the time within which said parties are required to comply with said order.

AND, now, on motion of Leopold M. Stern, attorney for J. B. Power, the trustee in bankruptcy herein,

THIS COURT DOES HEREBY FURTHER ORDER that the said Daniel Fuhrman, bankrupt, and Ray Fuhrman, his wife, on or before the 31st day of July, 1913, pay to J. B. Power, the trustee in bankruptcy herein, the sum of NINE THOUSAND DOLLARS, cash, belonging to said estate in bankruptcy, and which this Court finds to be now in their possession and under their control.

AND, IT IS FURTHER ORDERED that service of this order be made by delivery of a certified copy thereof, by the United States Marshal, to each of the said parties, namely, Daniel Fuhrman, bankrupt, and Ray Fuhrman, his wife.

The bankrupt and his wife, by E. H. Guie, their attorney, excepted to each and every portion of this order, and exception allowed.

Entered in open court this 23d day of July, 1913, at Seattle, Washington.

EDWARD E. CUSHMAN,
District Judge.

Receipt of a copy and due service hereof admitted this 22 day of July, 1913.

E. H. GUIE,
Attorney for Daniel Fuhrman, Bankrupt, and Ray
Fuhrman, His Wife. [10]

Return on Service of Writ.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Order confirming ruling of referee and directing payment of money to trustee, on the therein named Daniel Fuhrman, and Ray Fuhrman, his wife, by handing to and leaving a true and correct copy thereof with each of them personally at Seattle in said District on the 23d day of July, A. D. 1913.

Marshal's fees, \$4.06.

JOSEPH R. H. JACOBY,
U. S. Marshal,
By Geo. B. Devenpeck,
Deputy.

[Endorsed]: Order Confirming Ruling of Referee, and Directing Payment of Money to Trustee. Filed in the United States District Court, Western District of Washington, Jul. 23, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [11]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 4983.

In the Matter of DANIEL FUHRMAN, Bankrupt.

Findings of Fact and Conclusions of Law.

This proceeding having come on for hearing upon the order of the Court requiring Daniel Fuhrman and Ray Fuhrman, his wife, and each of them, to personally appear before the Honorable Edward E. Cushman, Judge of said court, on the 29th day of August, 1913, at the hour of ten o'clock in the forenoon of said day, and show cause why they should not be attached and punished for contempt in having wilfully and contemptuously disobeyed the order of this Court dated July 23, 1913, directing the said Daniel Fuhrman and Ray Fuhrman to pay over to said trustee in bankruptcy the sum of nine thousand dollars (\$9,000), and the Court, after considering the petition of the trustee in bankruptcy, the evidence offered in support thereof, the joint and several answers and supplemental answers made on oath by each of said respondents, the argument of counsel for the respective parties, and being fully advised in the premises, now on this 17th day of October, 1913, makes the following Findings of Fact and Conclusions of Law: [12]

FINDINGS OF FACT.

I.

That at all the times referred to in said proceed-

ings in bankruptcy herein, and for many years prior thereto, and at the time of the receipt of said sum of nine thousand dollars at all times referred to in said bankruptcy proceedings, the said Daniel Fuhrman and Ray Fuhrman were and still are husband and wife, and living together as such, in the city of Seattle, State of Washington.

II.

That the said Daniel Fuhrman has been convicted of the crime and offense of concealing from his trustee in bankruptcy, while a bankrupt, the said sum of nine thousand dollars, and other property, in that certain cause entitled "The United States of America v. Daniel Fuhrman, Number 2545," in the District Court of the United States for the Western District of Washington, Northern Division, and that judgment of conviction has been entered by the Court, and the said Daniel Fuhrman is now an inmate of the United States penitentiary, serving under said sentence, at McNeal Island in the State of Washington.

III.

That on the 2d day of April, 1913, the said Daniel Fuhrman and Ray Fuhrman, his wife, were indicted by grand jurors duly selected and sworn for the Northern Division of the Western District of Washington, they having, as it is alleged, *therefore* unlawfully conspired to conceal said sum of nine thousand dollars from the trustee in bankruptcy, while said Daniel Fuhrman was a bankrupt, which said indictment is still pending and undisposed of against said respondents, and each of them. [13]

IV.

That, thereafter, on the 12th day of September, 1913, the grand jurors of the United States of America, duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, duly indicted the said Daniel Fuhrman, Ray Fuhrman and one Jake Gross for conspiring, among other things, to conceal the said sum of nine thousand dollars from the trustee in bankruptcy, while he, the said Daniel Fuhrman, was a bankrupt, which said indictment is still pending and undisposed of as to each of said respondents.

V.

That the Court is unable to find from the evidence introduced that the respondent, Ray Fuhrman, has the present ability, or had the ability at the time of said contempt hearing, to turn over said sum of money, or any part thereof.

VI.

That at the time the said sum of nine thousand dollars was taken and received by the said Daniel Fuhrman, which was before the said Daniel Fuhrman was adjudged a bankrupt herein, the said Daniel Fuhrman was the husband of said Ray Fuhrman, and said parties were then and there living together as husband and wife in the city of Seattle, county of King, and State of Washington, and said sum of nine thousand dollars was the property of the said community composed of said Daniel Fuhrman and Ray Fuhrman under the laws of the State of Washington, and said Daniel Fuhrman, under the laws of said

State, had the right to exercise complete possession, control and management of said sum of nine thousand dollars. [14]

CONCLUSIONS OF LAW.

The Court finds as a conclusion of law:

I.

That under and by virtue of the community property law of the State of Washington, the presumption arises, as a matter of law, that the said Ray Fuhrman no longer has in her possession or control the said sum of nine thousand dollars, or any part thereof; but that the same has passed into the legal and actual possession and legal and actual control of said Daniel Fuhrman, her husband, and that this presumption of law is sufficient to overcome the presumption of fact, arising from the finding of the Referee and Court that respondent, Ray Fuhrman, had, with her husband, one of the respondents, Daniel Fuhrman, received and withheld said nine thousand dollars from the trustee in bankruptcy.

II.

That an order should be made herein discharging said order to show cause as to the said Ray Fuhrman, and without prejudice to the right of the trustee to renew said application hereafter.

DONE IN OPEN COURT, this 17th day of October, 1913.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Findings of Fact and Conclusions of Law. Filed in the United States District Court,

Western District of Washington. Oct. 18, 1913.
Frank L. Crosby, Clerk. By B. O. Wright, Deputy.
[15]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 4983.

In the Matter of DANIEL FUHRMAN, Bankrupt.
**Order [Discharging Order Requiring Ray Fuhrman
to Show Cause, etc.].**

This Court having made and entered its findings of fact and conclusions of law herein under date of October 17, 1913, upon the proceeding instituted by J. B. Power, trustee in bankruptcy of Daniel Fuhrman, bankrupt, to cause said Daniel Fuhrman and Ray Fuhrman to be attached and punished for contempt for having willfully and contemptuously disobeyed the order of this Court, dated July 23, 1913, NOW, THEREFORE,

IT IS ORDERED that the said order requiring the said Ray Fuhrman to show cause why she should not be attached and punished for contempt BE AND THE SAME IS HEREBY discharged as to her, without prejudice to the right of the trustee to renew said application hereafter.

ON MOTION of the trustee, IT IS FURTHER ORDERED that the said proceeding insofar as the same concerns Daniel Fuhrman BE AND SAME HEREBY IS continued indefinitely to be hereafter brought on for hearing and determination at the

option of the said trustee.

To so much of this order as concerns Ray Fuhrman, the trustee duly excepted. Exception allowed.

Entered in open court this 3d day of November, 1913.

EDWARD E. CUSHMAN,
District Judge.

Approved as to form:

_____,
Attorneys for Daniel Fuhrman and Ray Fuhrman.
[16]

Ray Fuhrman excepts to that part of the foregoing Order which recites "without prejudice to the right of the trustee to renew said application hereafter."

Exception allowed.

Daniel Fuhrman excepts to so much of said Order as concerns the said Daniel Fuhrman which continues the said proceeding indefinitely as to him and grants to the trustee the right to hereafter bring said proceeding on for hearing and determination as to him, the said Daniel Fuhrman.

Exception allowed.

Dated Nov. 3, 1913.

EDWARD E. CUSHMAN,
Judge.

Receipt of copy and service hereof admitted this 30th day of October, 1913.

E. H. GUIE,
Attorney for Respondents.

[Endorsed]: Order. Filed in the United States District Court, Western District of Washington, Nov. 3, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [17]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 4983.

In the Matter of DANIEL FUHRMAN, Bankrupt.
**Exceptions of Trustee to Findings of Fact and Con-
clusions of Law.**

COMES NOW J. B. Power, trustee of Daniel Fuhrman, Bankrupt, in the above-entitled proceeding, and EXCEPTS to the following Findings of Fact and Conclusions of Law, filed herein on the 17th of October, 1913;

Excepts to Paragraph Five of the Findings of Fact.

Excepts to Paragraph Six of the Findings of Fact.

Excepts to Paragraph One of the Conclusions of Law.

Excepts to Paragraph Two of the Conclusions of Law.

LEOPOLD M. STERN,

Attorney for Trustee.

The foregoing exceptions and each of them duly presented and allowed *nunc pro tunc* as of October 17, 1913.

Done in open court this 5th of November, 1913.

EDWARD E. CUSHMAN,

District Judge.

[Endorsed]: Exceptions of Trustee to Findings of Fact and Conclusions. Filed in the United States District Court, Western District of Washington.

Nov. 6, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [18]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4983.

In the Matter of DANIEL FUHRMAN, Bankrupt.

Praeipie [for Transcript of Record].

To the Clerk of the Above-entitled Court:

You will please prepare record consisting of following:

Order directing turning over of concealed assets, filed Mar. 8, 1913.

Decision on review, filed July 21, 1913.

Order confirming ruling of Referee, filed July 23, 1913.

Findings of fact and conclusions of law, filed Oct. 18, 1913.

Order discharging Ray Fuhrman, filed Nov. 3, 1913.

Exceptions of trustee, filed Nov. 6, 1913.

LEOPOLD M. STERN,

Attorney for Trustee.

[Endorsed]: Praeipie for Transcript. Filed in the United States District Court, Western District of Washington. Nov. 4, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [19]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4983.

In the Matter of DANIEL FUHRMAN, Bankrupt.
United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing 21 typewritten pages, numbered from 1 to 21, inclusive, to be a full, true, correct and complete copy of so much of the record and proceedings in the above and foregoing entitled cause as is called for by the praecipe of the attorney for the trustee and appellant, as the same remain of record and on file in the office of the Clerk of the said Court, and that the same constitute the transcript of record on Petition for Review from the order of the District Court of the United States for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to wit: [20]

Clerk's fee (Sec. 828, R. S. U. S. as Amended

by Sec. 6, Act of March 2, 1905) for mak-

ing transcript of the record for printing purposes—40 folios at 20c per folio.	\$8.00
Certificate to certified copy of typewritten transcript of record.30
Seal to said certificate.40
	<hr/>
	\$8.70

I hereby certify that the above cost for preparing and certifying record amounting to \$8.70 has been paid to me by Leopold M. Stern, Esquire, Attorney for Appellant.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 13th day of November, A. D. 1913.

[Seal]

FRANK L. CROSBY,

Clerk. [21]

[Endorsed]: No. 2344. United States Circuit Court of Appeals for the Ninth Circuit. J. B. Power, as Trustee in Bankruptcy of the Estate of Daniel Fuhrman, Bankrupt, Petitioner, vs. Ray Fuhrman, Respondent. In the Matter of Daniel Fuhrman, Bankrupt. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Western District of Washington, Northern Division.

Filed November 25, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
**United States Circuit Court
of Appeals**
For the Ninth Circuit

J. B. POWER, as Trustee in Bank-
ruptcy of the Estate of Daniel
Fuhrman, Bankrupt,

Petitioner,

No. 2344.

vs.

RAY FUHRMAN,

Respondent.

In the Matter of DANIEL FUHRMAN, Bankrupt.

Upon Review from the United States District Court
for the Western District of Washington,
Northern Division.

Brief of Petitioner

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IN THE

United States Circuit Court

of Appeals

For the Ninth Circuit

J. B. POWER, as Trustee in Bank-
ruptcy of the Estate of Daniel
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Brief of Petitioner

STATEMENT OF THE CASE.

This is a proceeding to review an order entered by the United States District Court for the Western District of Washington, Northern Division, dismissing certain contempt proceedings instituted by the trustee in bankruptcy against Ray Fuhrman, wife of the bankrupt. One Daniel Fuhrman had been adjudged bankrupt by the District Court. In due course, J. B. Power, the trustee in bankruptcy, by appropriate proceeding, charged the bankrupt and his wife, Ray Fuhrman, with fraudulently concealing and withholding from him \$24,000 in cash belonging to the estate, and sought to enforce a surrender of this fund.

Issue having been joined by written pleadings, and proof taken, the referee became satisfied beyond all reasonable doubt that the contention of the trustee was sustained, except as to the amount. An order was thereupon entered requiring the bankrupt and his wife, Ray Fuhrman, to pay to the trustee the sum of \$9,000 cash belonging to the estate, which sum the referee held to be then in their possession and control.

At the instance of both parties, this order was

certified to the District Judge for review, with the result that the decision and order of the referee was in all respects, confirmed by Cushman, District Judge, in a written opinion, followed by an order which required the bankrupt and his wife, Ray Fuhrman, to pay over to the trustee \$9,000 on or before July 31st, 1913.

Thereafter, due service of the order was made in the manner directed therein. The time elapsed, but no part of the money was paid. The trustee then instituted contempt proceedings against the parties to enforce the performance of the affirmative act required by the court's order. Upon the hearing of these proceedings, same were, on motion of the trustee, continued indefinitely as to the bankrupt, he having in the interim been found guilty in the criminal department of the United States District Court for concealment of this fund, and having already commenced serving his sentence in the United States penitentiary.

As to the defendant Ray Fuhrman the charges were pressed by the trustee, but the court purged her of contempt and dismissed the proceeding as against her on the ground that under the community

property law of the state of Washington it must be legally presumed that the money had passed out of her possession and control to the possession and control of her husband.

It is this decision and order of the District Court which the trustee brings here for review.

SPECIFICATIONS OF ERROR.

THE DISTRICT COURT ERRED IN MAKING THE ORDER OF NOVEMBER 3, 1913, DISCHARGING RAY FUHRMAN FROM THE CONTEMPT PROCEEDING.

BRIEF OF THE ARGUMENT.

The power of the court to order a bankrupt or a third person having money belonging to the bankrupt's estate to make payment thereof to the trustee will not be questioned. In case of non-compliance, the trustee, as was done in this case, may ask the court to enforce obedience to its order by exercising its power of commitment for contempt. We readily concede that, for these reasons, it is only in clear cases in which the proof is decisive of the party's possession or control of the fund and his ability to surrender it, that the court is justified in making a peremptory order of this character.

That the power to make the order entered in this case was cautiously exercised, and only when its propriety was beyond a reasonable doubt is manifest from the findings of the court, as embraced in the order itself. The referee in bankruptcy who heard the evidence has held this office since the enactment of the Bankruptcy Act of 1898. Concededly a man of great legal attainments and most extensive judicial experience, this referee, after hearing all the evidence, found:

“That the undersigned referee is satisfied beyond all reasonable doubt that at the time of the filing of said petition by the trustee, and ever since, and at the present time, said Daniel Fuhrman, bankrupt, and his wife, Ray Fuhrman, had, and now have, in their possession and under their control, the sum of Nine Thousand (\$9,000.00) Dollars in cash, belonging to said estate in bankruptcy, which sum, the said Daniel Fuhrman, bankrupt, and Ray Fuhrman, his wife, have concealed and withheld, and now conceal and withhold from the trustee herein.

“And the undersigned referee in bankruptcy is satisfied beyond all reasonable doubt of the present ability of the said Daniel Fuhrman, bankrupt, and his said wife, Ray Fuhrman, to comply with the order of this court herein made.

“WHEREFORE, IT IS ORDERED that the said Daniel Fuhrman, bankrupt, and Ray Fuhrman, his wife, within ten days after the date of the entry of

this order, PAY to J. B. Power, the trustee in bankruptcy herein, the sum of NINE THOUSAND DOLLARS (\$9,000.00) cash, belonging to the said estate in bankruptcy, and which this court finds to be now in their possession and under their control." (Record pp. 7 and 8.)

And upon review of these findings and order, the District Judge, in his written opinion, after quoting the first two paragraphs of the referee's findings and order, as we have set them forth above declared:

"Upon the hearing before the referee, a large amount of testimony was submitted to the referee upon the questions involved and determined. A review or analysis of the evidence is not deemed necessary. There was ample testimony to support the findings and order of the referee and the same are, in all things, confirmed, save that, as the time allowed the referee's order, to comply therewith, has expired, the order is now modified to read 'on or before July 31st,' instead of 'within ten days after the date of the entry of this order,' as recited in the order reviewed." (Record, p. 11.)

Immediately after filing this opinion, the District Judge on July 3d, 1913, entered an order, not merely confirming and approving the decree and order of the referee "in all things," but the order further read as follows:

"This court does hereby further order that the

said Daniel Fuhrman, bankrupt, and Ray Fuhrman, his wife, on or before the 31st day of July, 1913, pay to J. B. Power, the trustee in bankruptcy herein, the sum of Nine Thousand Dollars, cash, belonging to said estate in bankruptcy, *and which this court finds to be now in their possession and under their control.* (The italics are ours.)

“And, it is further ordered that service of this order be made by delivery of a certified copy thereof, by the United States Marshal, to each of the said parties, namely, Daniel Fuhrman, and Ray Fuhrman, his wife.” (Record, p. 13.)

The order was not obeyed, and the trustee immediately sought to make it effective by instituting proceedings for contempt against the respondents. After some delays, this proceeding came on for hearing. We concede that at this hearing, the trustee offered in evidence and relied only upon the record embracing the proceedings leading to and including the order of the District Judge heretofore quoted in this argument. The respondent's defence was purely a legal one. (Record, p. 15.)

Inasmuch as the bankrupt had already been convicted of the crime of concealing \$9,000 and other property from the trustee, and was then serving his sentence in the United States penitentiary, the proceedings against him were suspended

by the trustee. Obviously, at that time, a judgment by the court that he was guilty of contempt and should be imprisoned until he obeyed the order would have been ineffectual, he being already incarcerated. The trustee, however, pressed the proceedings so far as concerned Ray Fuhrman, the wife of the bankrupt. The court refused to commit her for contempt, and dismissed the proceeding against her.

It would appear from the findings of fact and conclusions of law that this judgment was based upon the ground that, under the community property law of the state of Washington, the husband had a right to the possession and control of this fund, and that the court must presume as matter of law that the \$9,000 had passed into the possession and control of the husband.

Taking up this proposition we find the court's position stated in the sixth finding of fact, reading as follows:

"That at the time the said sum of nine thousand dollars was taken and received by the said Daniel Fuhrman, which was before the said Daniel Fuhrman was adjudged a bankrupt herein, the said Daniel Fuhrman was the husband of said Ray Fuhr-

man, and said parties were then and there living together as husband and wife in the city of Seattle, county of King, and state of Washington, and said sum of nine thousand dollars was the property of the said community composed of said Daniel Fuhrman and Ray Fuhrman under the laws of the state of Washington, and said Daniel Fuhrman, under the laws of said state, had the right to exercise complete possession, control and management of said sum of nine thousand dollars." (Record, p. 17.)

The conclusion of law reads as follows:

"That under and by virtue of the community property law of the state of Washington, the presumption arises, as a matter of law, that the said Ray Fuhrman no longer has in her possession or control the said sum of nine thousand dollars, or any part thereof; but that the same has passed into the legal and actual possession and legal and actual control of said Daniel Fuhrman, her husband, and that this presumption of law is sufficient to overcome the presumption of fact, arising from the finding of the referee and court that respondent, Ray Fuhrman, had, with her husband, one of the respondents, Daniel Fuhrman, received and withheld said nine thousand dollars from the trustee in bankruptcy." (Record, p. 18.)

The law of the state of Washington referred to by the court is found in Section 5917, of *Rem. & Bal. Code*, which reads as follows:

"Sec. 5917. Community Property Defined—Husband's Control of Personality.

“Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.”

The “next two preceding sections” above referred to are Sections 5915 and 5916, of *Rem. & Bal. Code*, which define Separate Property of Husband and Separate Property of Wife, respectively.

We fail to see the pertinence of the law of the state of Washington defining the respective rights of the husband and wife to community property and the control thereof. This is not a question of property rights between husband and wife. Whether the \$9,000 was community property or the separate property of the husband, whether it was in the possession and control of the wife, or husband, or both, the trustee in bankruptcy was entitled to its possession, and to have the aid of the court in enforcing its surrender.

As a rule, when the husband becomes a bankrupt, proceedings of this character are instituted only against him, because, as a rule, the wife has

concerned herself solely with her household duties, has taken no part in the business which became bankrupt, did not participate in and perhaps knew nothing of the transactions of the husband constituting the concealment of the assets. Under such circumstances, it would be improper for the trustee to join the wife in the proceedings commenced against the bankrupt to enforce a surrender of the concealed assets.

But, are there not cases, in which the business, while standing in the name of the husband, may yet be managed and controlled by the wife? Are there not even more frequent cases where, although the business stands in the name of the husband, the wife, nevertheless, shares with him the responsibility of the care and operation thereof? The writer of this brief, and probably every reader hereof, knows of many a venture of just this kind, where the wife comes to the store in the morning with her husband and occupies herself throughout the day, in as great degree as her husband, in the buying, selling, handling of funds, and other important duties pertaining to the business. And it may be readily conceived that a woman of this

character is apt to assert a considerable voice in shaping the policy of the business.

If a business, operated by a community in this way, becomes bankrupt, may it not happen that the wife and husband have actually confederated and conspired to conceal a large sum of money and property from the trustee. And if the trustee can establish the wife's personal and active participation in the concealment, should she not be made a party to any proceeding to compel a surrender of the concealed assets?

Such was the opinion of the trustee in initiating this proceeding against both the wife and the husband, and his position was supported by the referee, and the District Judge, both of whom found as a *fact*, that beyond all reasonable doubt, the bankrupt *and his wife* had at all times been in the possession and control of \$9,000 cash belonging to the estate; that both the bankrupt *and his wife* at all times had concealed and withheld, and continued to conceal and withhold this sum from the trustee; that *beyond all reasonable doubt*, the bankrupt *and his wife* had the present ability to comply with the order of the court. And the final order of the court was that

the bankrupt, *and his wife* pay this sum over to the trustee on or before July 31st, 1913.

These findings and orders against the wife could not have been based merely upon a legal presumption arising out of the community relation; the findings must have been and were made because, from all the evidence, the court became satisfied in this particular case, that the wife had, *in fact*, actually co-operated, confederated and conspired with her husband in accumulating and concealing this sum of \$9,000; that *she* knew where it was concealed; and that *she* had it in her power to deliver it or to disclose its whereabouts to the trustee.

As was said by the court *In re Baum*, 169 Fed. 410; (C. C. A. Ark.); 22 A. B. R. 295:

“The court, of course, could not require the petitioner to do an impossible thing and then punish him for refusing to perform it. Therefore, from the fact that the court ordered him to pay over the money, it must necessarily have had before it testimony sufficient to satisfy it of his ability to comply.”

And, so, we say here, the order of the referee and the court conclusively determined that the respondent, Ray Fuhrman, was *in fact*, a co-conspira-

tor with Daniel Fuhrman, the bankrupt, in the concealment of the fund. Whether she was wife, sister, friend or agent of the bankrupt cut no figure in the original proceeding, and it should cut no figure in the determination of the contempt proceeding. It was error on the part of the District Court to concern itself in any degree with the question whether Ray Fuhrman was the wife of the bankrupt, and make that the pivotal point in arriving at its judgment. There was before the court its solemn judgment of July 23rd, 1913, that Daniel Fuhrman and Ray Fuhrman then had in their possession and under their control the \$9,000 cash, together with the fact that Ray Fuhrman had not complied with the order directing her to turn the same over to the trustee. The only possible excuse she could make in the contempt proceeding for not complying with the court's order would have been to show that, after July 23rd, 1913, *without fault on her part*, the money had been taken from her possession and placed beyond her control. This she neither did nor attempted to do. The respondent in this case should have been held in contempt, or purged from contempt, not on the ground of any legal presumption arising out of her community relation,

but solely upon the *fact* whether, since July 23rd, 1913, *without fault on her part*, she had become physically unable to comply with the terms of that judgment.

As was said *In re Eddleman*, 154 Fed. 160; (D. C. Ky.); 19 A. B. R. 45:

“Under such circumstances the wife should be regarded as agent for the husband and treated accordingly.”

The following, also, are bankruptcy cases, in which the wife of the bankrupt was made to answer, both in summary and in contempt proceedings instituted by the trustee to enforce the surrender of assets belonging to the estate shown to have been concealed from the trustee by the wife:

In re Eddleman, supra.

In re Friedman, 153 Fed. 939; 18 A. B. R. 714; (D. C. N. Y.) Affirmed 161 Fed. 260; (C. C. A.) 20 A. B. R. 37.

In re Moore, 104 Fed. 896; (D. C. W. Va.) 5 A. B. R. 151.

As we read the findings of fact and conclusions of law, the judgment of dismissal rested entirely upon finding of fact No. 6, and conclusion of law No. 1—in other words, the legal presumption that

although the respondent Ray Fuhrman did, originally, have the \$9,000 in her possession and under her control, the same being community property must be presumed, as a matter of law, to have passed to the possession and control of the husband since the entry of the order of surrender.

We have already argued the proposition that the contempt hearing should have been determined solely on issues of fact and not on presumptions of law, and we would conclude our brief at this point, did we not anticipate that the respondent would seek to uphold the court's judgment on the recitals embraced in finding of fact No. 5, which reads as follows:

"That the court is unable to find from the evidence introduced that the respondent, Ray Fuhrman, has the present ability, or had the ability at the time of said contempt hearing, to turn over said sum of money, or any part thereof." (Record, p. 17.)

On what facts the court below based this finding, it is difficult to conceive. We concede that the trustee in this contempt proceeding relied entirely upon the order of July 23rd, 1913, which expressly recited that Ray Fuhrman *then* had in her pos-

session and under her control \$9,000 cash belonging to the estate, and directed her to pay over this sum to the trustee on or before July 31st, 1913. The trustee did not offer any additional evidence to prove that Ray Fuhrman at the time of the contempt hearing had the ability to comply with the order of the court. *It is also true that the respondent made no defence other than to question the legal sufficiency of the proof introduced by the trustee.* (Record, p. 15.)

It may be that the court below was of the opinion that the burden was on the trustee to show, affirmatively, at the contempt hearing that *at that very time* the respondent had the ability to turn over said sum to the trustee, and, that having failed to maintain this burden, the court believed it was justified in making finding of fact No. 5. Or, it may be that finding of fact No. 5 and finding of fact No. 6 should be read together and that the court based finding of fact No. 5 on the same theory expressed in finding of fact No. 6, that is to say, the court was unable to find that the respondent Ray Fuhrman had the present ability to turn over the \$9,000 *because* she was the wife of the bankrupt,

and *because* the money was community property and the husband had the right to exercise complete possession and control and management thereof.

The conclusions of law as made by the court deal only with the subject of legal presumption arising from the community relation, and this bears out the last mentioned theory of the probable basis of the court's finding of fact No. 5. If this surmise is correct, the fallacy of the court's reasoning has already been discussed.

If, on the other hand, this finding was made because the trustee failed to prove, affirmatively, that the respondent at the time of the contempt hearing had the ability to comply with the order, the court erred in imposing the burden of proof upon the trustee, and in making this finding because the trustee made no attempt to assume this burden. However, it would seem that finding of fact No. 5 is not mentioned or suggested in the remotest degree in the conclusions of law made by the court. This finding did not form the basis of the conclusions of law, and, therefore, it cannot be advanced as supporting the judgment.

We will, nevertheless, discuss the question of

the correctness of the court's ruling that the burden of proof in the contempt proceeding was on the trustee.

Upon this question, the authorities are numerous and harmonious. The contempt proceeding was based upon the failure of the respondent to obey the order of July 23rd, 1913, which expressly recited that the respondent, on that very day, had in her possession and under her control \$9,000 cash belonging to the estate, and which sum she was ordered to pay over to the trustee on or before July 31st, 1913. That order was before the court at the contempt hearing and it was admitted by the respondent that it had not been obeyed. That order, then, was final and conclusive as to the ability of the respondent to comply with the order upon the date upon which it was made, and this subject could not be reopened at the contempt hearing. *Remington on Bankruptcy*, Volume III, page 568, says:

"Sec. 1857. Whether Evidence on Which Order for Surrender Based May be Re-Examined.

"On Principle it would seem that since the order to surrender assets may be granted only on convincing evidence or evidence beyond a reasonable doubt, the court, on contempt proceedings for failure to obey such order, ought not to go behind the order

itself, if the order was not appealed from, and ought to take into consideration only facts arising subsequently thereto, leaving the propriety of the order itself remediable by appeal or petition for review, since otherwise the contempt proceedings would be diverted into an appeal from the order of surrender itself."

And, again, on page 569, the same author says:

"At any rate, the order for surrender makes a *prima facie* case of possession, such that the trustee's petition for punishment for contempt need not allege ability to comply with the original order for surrender."

In support of this principle, the following cases may be cited:

In re Lans, 19 A. B. R. 458; 158 Fed. 610.
(C. C. A., N. Y.)

In re Home Discount Co., 17 A. B. R. 175;
147 Fed. 538. (D. C., Ala.)

In re Frankel, 25 A. B. R. 920; 184 Fed. 539.
(D. C., N. Y.)

In re Kirsner vs. Taliaferro, 29 A. B. R. 832;
202 Fed. 51. (C. C. A., 4th Cir.)

*In re Stavrah*n, 23 A. B. R. 168; 174 Fed.
330. (D. C., N. Y.)

In the case at bar it was not incumbent upon the trustee at the contempt hearing to do more than offer so much of the record as showed the order of

surrender and the service thereof. The failure to comply with the order having been admitted by the respondent, it then devolved on the respondent to show what she had done with the money since the date of the order. That order, as hereinabove set forth, was conclusive of the fact that she did have \$9,000 on July 23rd, 1913. In determining the question of contempt, the disposition of the \$9,000 subsequent to July 23rd, 1913, must be established by the respondent and not by the trustee.

Exactly in point is the case of *In re Stavrahn*, *supra*, in which the court concludes its opinion in the following language:

“When the matter was before the District Court in February, 1909, on the final application to punish the bankrupt for a willful and contumacious disobedience of the order of August 5th, 1908, directing him to pay over, it appeared that before the last-named order was made there had been two adjudications, after full hearings, whereat the bankrupt testified and had the right to produce witnesses, both finding that the bankrupt had fraudulently concealed at least \$5,000, the profits of a certain real estate transaction which he should have turned over with the rest of his estate. It further appeared that the bankrupt had not taken any steps to review either of these adjudications. Certainly this was sufficient, *prima facie*, to establish the proposition that at some time subsequent to the

bankruptcy, and prior to August 5th, 1908, he was in the actual possession of that particular sum of money. In the face of such a finding it was incumbent on the bankrupt to give some reasonable explanation as to why it was that he did not turn it over in compliance with the order requiring him so to do; it was for him to explain how and why it was that this particular sum, in his possession a few months before, had disappeared, so that he no longer 'had the ability to turn it over in compliance with the order.' This he wholly failed to do. His affidavits in opposition to the motion goes at great length into certain transactions subsequent to the bankruptcy relating to the leasing of a building, the purchase of its equipment and the establishing therein of a restaurant business with himself as manager—all with funds advanced by his father-in-law. As to what became of the real estate profits—the \$5,000, which it had been held he concealed—nothing is said. The sole averment is: 'That the reason your deponent has not turned over said sum is because he has no such sum in his possession or under his control, directly or indirectly, and has no means whatsoever of obtaining said sum of money.' In view of the case made out by the moving papers this averment is too bald and indefinite to have any persuasive force and we think the order of commitment was warranted by the record before the district judge."

We desire also to particularly call the attention of the court to the case of *In re Frankel, supra*, wherein the District Judge, in an exhaustive opinion which reviews the decisions in many jurisdictions, discusses the rules which should govern the pro-

cedure in contempt proceedings, and finally comes to the conclusion, which is best expressed by the *syllabus*, in the American Bankruptcy Report, as follows:

“An order of a referee adjudging that a bankrupt turn over certain property to his trustee is a conclusive determination that at the time such order was made the bankrupt was in possession of the property directed to be turned over, and the time for review having expired, the bankrupt is estopped from denying such fact upon a motion to punish him for contempt for refusing to obey. *The only issue open to the respondent in such case is to show what he has done with the property since the date of the order.*” (Italics are ours.)

The case of *In re Kirsner vs. Taliaferro*, *supra*, is also particularly illuminating on this subject, the court arriving at practically the same conclusion as that announced *In re Frankel*, *supra*.

The attention of this court is also particularly called to the late case of *In re Epstein*, 30 A. B. R. 387; 206 Fed. 568. (D. C., Pa.), in which the District Court, speaking of the order of surrender, says:

“If this order becomes final, either by failure to have it reviewed or by affirmance in the District Court, a definite step has been taken; the proper tribunal has settled beyond future controversy that

the assets described were in the bankrupt's possession or control at the time of bankruptcy."

The court in this same case then goes on to hold that the bankrupt, to escape punishment for contempt, must satisfy the court that he is physically unable to obey the order, and, he must make this showing, not by denying, or attempting to show that he never had the money, but by admitting that he did have the money, but establishing to the satisfaction of the court that he *no longer has it*, in which event, he may still be liable under the criminal law, but cannot be confined by civil process, and this court says further (page 390):

"Actual or virtual imprisonment for debt has ceased, but imprisonment to compel obedience to a lawful judicial order (if it appear that obedience is being wilfully refused) has not yet ceased, and ought not to cease unless it should be thought expedient to destroy all respect for the courts by stripping them of power to enforce their lawful decrees."

And, so, we contend, that under the authorities above cited, the burden was entirely upon the respondent, after admitting that she did have the money in her possession and under her control when the order of July 23rd, 1913, was made, to

show the happening of certain events in the interim (between the making of the order and the contempt hearing) which then made it physically impossible for her to obey the order; that upon such a showing only, an order dismissing her from the contempt proceeding would be proper.

Something should be said concerning the findings of fact Nos. 2, 3 and 4, which mention the pendency of the criminal proceeding against the bankrupt and the respondent arising out of the same subject matter which forms the basis of the contempt proceeding. It is apparently the purpose of the respondent to contend that because the government had instituted criminal proceedings for violation of a criminal statute, against the bankrupt and the respondent, the District Court should not have entertained the contempt proceeding, presumably because it was an effort to impose double punishment for the same offence. This position, however, is wholly untenable, as the contempt proceedings were instituted, not for the purpose of punishment, but to coerce the respondent to perform the affirmative act required by the court's

order. In such case, the commitment stands only until the order has been complied with. If imprisoned, as is aptly said *In re Nevitt*, 117 Fed. 461, "he carries the keys of the prison in his own pocket. He can end the sentence and discharge himself at any moment by doing what he had previously refused to do."

The distinction between criminal contempt, the punishment for which is punitive and to vindicate the authority of the court, and civil contempt, the punishment for which is remedial and for the benefit of the complainant in the contempt proceeding, is clearly point out in

Gompers vs. Buck Stove Co., 224 U. S. 418;
31 Sup. Ct. 492.

and also in the following bankruptcy cases:

In re Kahn, 30 A. B. R. 322; 204 Fed. 581.
(C. C. A., 2nd Cir.)

In re Kirsner vs. Taliaferro, *supra*.

In conclusion, we maintain that the lower court heard this case and rendered its decision upon an entirely wrong theory, to the prejudice of the trustee. We ask this court not to reverse the lower

court to the extent of ordering the commitment of the respondent for contempt, but we do ask this court to reverse the decision and order of the lower court to the extent of directing a rehearing of the contempt issues upon the following lines of procedure; first, the lower court must accept the order of July 23rd, 1913, as conclusive of the respondent's possession and control of the \$9,000 on the date the order was made; second, the court must hold that the burden rests upon the respondent to show such a disposition of the \$9,000 subsequent to July 23rd, 1913, as makes it impossible for her to comply with the order; third, that if this showing does not go beyond a mere denial that the respondent ever had possession or control of the money, and that she had it on July 23rd, 1913, the court must then commit the respondent for contempt, and order her to be incarcerated until she complies with the order, or, until otherwise discharged by the court.

Respectfully submitted,

LEOPOLD M. STERN,

Attorney for Petitioner.

IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. B. POWER, as Trustee in Bank-
ruptcy of the Estate of Daniel Fuhr-
man, Bankrupt,

Petitioner,

No. 2344.

vs.

RAY FUHRMAN,

Respondent.

IN THE MATTER OF DANIEL FUHRMAN,
BANKRUPT.

UPON REVIEW FROM THE UNITED STATES
DISTRICT COURT, FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

Brief of Respondent

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IN THE UNITED STATES
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man, Bankrupt,

Petitioner,

vs.

RAY FUHRMAN,

Respondent.

No. 2344.

IN THE MATTER OF DANIEL FUHRMAN,
BANKRUPT.

UPON REVIEW FROM THE UNITED STATES
DISTRICT COURT, FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

Brief of Respondent

BRIEF OF THE ARGUMENT.

The Referee in Bankruptcy in this proceeding made a finding that the said Daniel Fuhrman, bankrupt, and his wife, Ray Fuhrman, had in their possession and under their control, the sum of \$9,000.00 in cash belonging to said estate in bankruptcy, and that the referee was satisfied with the ability of the bankrupt and his wife to then comply with the order of the court.

The legal effect and the effect in fact of this finding is that the marital community, consisting of Daniel Fuhrman and respondent, was the owner and in possession of the fund previous to and at the time the petition to have Daniel Fuhrman adjudged a bankrupt was filed. Not that the wife, *Ray Fuhrman, was in possession of said sum.* This construction is clarified by the finding of the District Court on the contempt hearing, viz.: by Finding of Fact VI (Record, page 17), which is as follows:

“That at the time the said sum of *nine thousand dollars was taken and received by the said Daniel Fuhrman*, which was before the said Daniel Fuhrman was adjudged a bankrupt herein, the said Daniel Fuhrman was the husband of said Ray Fuhrman, and said parties were then and there living together as husband and wife in the City of Seattle, County of King, and State of Washington,

and said sum of nine thousand dollars was the property of the said community composed of said Daniel Fuhrman and Ray Fuhrman under the laws of the State of Washington, and said Daniel Fuhrman, under the laws of said state, had the right to exercise complete possession, control and management of said sum of nine thousand dollars."

Here is a direct finding that Daniel Fuhrman, the husband, and *not* Ray Fuhrman, the *wife*, had said sum.

As Conclusion of Law I the court finds:

"That under and by virtue of the community property law of the State of Washington, the presumption arises, as a matter of law, that the said Ray Fuhrman no longer has in her possession or control the said sum of nine thousand dollars, or any part thereof; but that the same has passed into the legal and actual possession and legal and actual control of said Daniel Fuhrman, her husband, and that this presumption of law is sufficient to overcome the presumption of fact, arising from the finding of the Referee and Court that respondent, Ray Fuhrman, had, with her husband, one of the respondents, Daniel Fuhrman, received and withheld said nine thousand dollars from the trustee in bankruptcy." (Record p. 18.)

Had the Referee found that the wife *individually* had possession of said sum a different question would be presented, but there is no finding by the Referee or in the order of the court confirming the Referee's decision, that *the wife, separate and apart*

from her husband, ever had any personal or individual control over the said sum of money or any portion of the same which it is alleged was concealed. The Referee found her to be in *the joint control* of the money by virtue of her marital status and *not otherwise*. The law of the State of Washington, referred to by the court in its Conclusion of Law I (Record p. 18), is set forth in appellant's brief, and is as follows:

“Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.” (*Rem. & Bal. Code*, Sec. 5917.)

The bankrupt had the exclusive management, control and disposition of the community personal property under the community law of the State of Washington. (Finding of Fact VI; Record p. 17.)

First National Bank vs. Fowler, 54 Wash. 65, 70.

12 *Am. & Eng. Ency. Law* (2nd Ed.) 209.

Therefore the finding of the Referee is limited to the community and not to the husband and wife separately.

No case has been cited nor can any be found where a wife has been held liable for the misdeeds of her husband in concealing or disposing of their joint community property in fraud of creditors, and certainly no *contempt* liability should attach in the absence of a clear and specific finding that the wife personally and separately held the money. The cases cited by petitioner in support of his contention to this effect are not in point, viz.:

In re Eddleman, 154 Fed. 160 (D. C.), is a case where the bankrupt, previous to the petition in bankruptcy being filed, handed over to his wife personally the proceeds received by him from the sale of property. The court held that she would be regarded as holding the same as his agent, and that such facts would justify an order requiring the bankrupt to pay the money to his trustee. In this case no proceedings were brought against the wife.

In re Friedman, 153 Fed. 939 (D. C. N. Y.), a shoe dealer sold his entire stock, receiving \$3,850 therefor, which was given to his wife. The court found that the wife had the actual separate and individual possession of the money.

In re Moore, 104 Fed. 869, the bankrupt just

prior to the filing of the petition, turned over to his wife certain moneys and property amounting to \$300.00 in value which she refused to turn over to the trustee, although admitting the receipt.

No such state of facts exists in the case at bar as are in the several cases cited by petitioner. The only possession and control Ray Fuhrman had, as found by the Referee, was a presumptive possession as a member of the community. This presumption cannot obtain because of the Washington statute above cited vesting in the husband the management and control of community personal property with a like power of disposition as he has of his separate personal property; and it is submitted that no person may be lawfully convicted of contempt *on a community or presumptive possession*. The evidence must show that the person proceeded against, *personally* and free from the control of her husband, has possession of the money or other property.

Aside from the presumption the court by Finding of Fact VI says, in no unmistakable terms, that the money was taken and received by the bankrupt before *he* was adjudged such, and, as stated in Conclusion of Law I, that the same passed into the legal and actual possession and legal and actual control of the bankrupt, and that the respondent did not

have, nor did she ever have, any possession or control of the said sum of money or any portion of the same.

Petitioner cannot in this court complain of Finding VI made by the District Court. The record does not contain the evidence taken by the Referee or the evidence taken on the hearing for contempt and it must be presumed that the facts disclosed by the evidence were sufficient to sustain all the findings as made by the court on the contempt hearing.

In re Baum, 169 Fed. 410 (C. C. A. Ark.), 22 A. B. R. 295.

The District Court found, by Finding of Fact V, (Record p. 17), "That the court is unable to find from the evidence *introduced* that the respondent, Ray Fuhrman, has the present ability or had the ability at the time of said contempt hearing to turn over said sum of money or any part thereof." And this court is bound to assume that the facts, as presented to the court, are ample to sustain said finding.

Section 24b of the Bankrupt Act under which the review is taken reads as follows:

"The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in *matter of law* the pro-

ceedings of the several inferior courts of bankruptcy within their jurisdiction. * * * *”

This is confined to questions of law and does not contemplate a review of the facts. This court may only superintend, and if need be, review the lower court's action in the *matter of law*. This is the settled interpretation given section 24b.

Matter of Loring, 224 U. S. 183.

Coder vs. Arts, 213 U. S. 223.

First Nat'l Bank vs. Chicago Title & Trust Co., 198 U. S. 280.

Mueller vs. Nugent, 184 U. S. 1.

Samel vs. Dodd, (Fifth Cir.), 142 Fed. 68.

In re Purvine, (Fifth Cir.), 96 Fed. 192.

II.

The proof which will justify a judgment of the court depriving the contemnor of his or her liberty must be clear and convincing. It must be sufficient to convince beyond a reasonable doubt as in any criminal action. The essential elements of wilful disobedience and present ability to obey must be established by clear and convincing proof before the court can find that the accused person is in contempt.

The District Court must be satisfied beyond a

reasonable doubt that the respondent can comply with its order to be justified in adjudging her guilty of contempt.

Loveland on Bankruptcy, 1240.

Boyd vs. Glucklich, 116 Fed. 131.

In re Felson, 124 Fed. 288.

Ex Parte Comingor, 107 Fed. 898.

In re Alter, 170 Fed. 634.

In re Hausman, 121 Fed. 984.

American Fruit Co. vs. Wallis, 126 Fed. 464,
131 Fed. 643.

In re Sweitzer, 140 Fed. 976.

In re Dawson, 143 Fed. 673.

Samel vs. Dodd, 142 Fed. 68.

Stuart vs. Reynolds, 204 Fed. 709.

“The power to punish for contempt is cautiously exercised.”

Remington on Bankruptcy, Vol. II, Sec. 2336,
p. 1418.

Defendant must be proved guilty of contempt.

Gompers vs. Buck's Stove & R. Co., 221 U. S.
418.

No court can be so convinced unless the evidence clearly shows that the person proceeded against personally holds the money or property indi-

vidually, especially where the relationship of husband and wife is shown to exist.

In *Samel vs. Dodd*, 142 Fed. 68, the court states, on page 17:

“While bankruptcy courts are invested with power, as we have already shown, to require bankrupts to surrender their property and to enforce obedience to the order by attachment for contempt, yet the power is far-reaching and drastic and should be exercised with cautious discretion. Indeed, it may be said that it should never be exercised, except in a plain case, and always with due regard to the constitutional rights of the citizen. In this immediate connection the apt words of Mr. Justice Bradley may be appropriately employed. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. *Boyd vs. U. S.*, 116 U. S. 635; 29 L. Ed. 746.”

And on page 73 of the same decision:

“The bankrupts, in their answers, have sworn that they have not in their possession and control either the money or the goods involved in this proceeding. It seems to me that any evidence that conclusively showed they presently had in possession and control either the money or the goods would necessarily show where the same was kept or deposited, so that it could be reached by the process of the bankruptcy court, or of some court in a suit by the trustee. But, however that may be, the record in the cause, taken as a whole, fails to show that the bankrupts had in their possession at the date of

the order committing them for contempt either the money or the goods referred to. If the bankrupts have sworn falsely in their pleadings or on their examination, and this proceeding is based solely on that hypothesis, the law provides for their punishment or indictment and conviction by a procedure which secures to them the right of trial by jury with all its constitutional safeguards."

In the case at bar the respondent made her sworn answer denying that she had the money or ever had it; denying that she had the possession or control of the same, or that she had the ability to pay the money over to the trustee. And she testified herself and adduced other proof in support of her answer, notwithstanding the statement of counsel for petitioner in his brief that no proof was offered, and this evidence was before the court when its order and findings were made and entered herein.

It was on the testimony *introduced* at the contempt hearing that the court was unable to find that respondent had the ability at the time of said contempt hearing to turn over the money or any part thereof. Before respondent could be committed for contempt the court would have to find, beyond a reasonable doubt, that she had the ability at the time of the hearing to pay over the money.

McNeil vs. McCormack, 182 Fed. 808.

In contempt cases, and especially in those which involve the charge of another criminal offense besides the contempt, the rules of evidence applicable to civil cases in reference to presumption and the shifting of proof do not apply; but the proceedings and the rules of evidence and presumptions of law applied in criminal cases should be observed.

State vs. Matthews, 37 N. H. 450, 454.

United States vs. Wayne, Fed. Cas. No. 16,654.

United States vs. Jose, 63 Fed. 951.

In re Sweitzer, 140 Fed. 976.

Stuart vs. Reynolds, 204 Fed. 712, 715.

Petitioner maintains that the finding of the Referee that the bankrupt and respondent had the money in their possession and control, is conclusive upon the respondent and the court, that from that time on and from the time affirmance of the finding by the court, that the duties of the court were merely formal and ministerial. That upon the trustee filing a petition that the bankrupt or contemnor had failed to obey the order of the court by paying over the money to the trustee, the court is precluded from making any independent investigation, that it is estopped from making any finding of fact which conflicts with the findings already made, and

that the burden is on the contemnor to establish and prove inability to comply with the Referee's order.

There are two distinct lines of decisions upon this subject. Those cited by appellant, which hold, in substance, that an order of the Referee, made after hearing and supported by evidence, adjudging the bankrupt to have in his possession and control a certain sum of money or specific property belonging to his estate, and requiring him to turn over to the trustee such money or property, which order he neither obeys nor seeks to have reviewed, creates a presumption of the ability of the bankrupt to comply with the order and casts upon him the burden of proving the contrary, and that such presumption becomes final and conclusive unless the bankrupt gives an adequate explanation of what has become of the money or property. These cases are:

In re Frankel (D. C.), 184 Fed. 539.

*In re Stravrah*n, 174 Fed. 330, 98 C. C. A. 202.

In re Marks (D. C.), 176 Fed. 1018.

In re Richards (D. C.), 183 Fed. 501.

In re Commongs (D. C.), 186 Fed. 1020.

In the other line are the courts which hold in substance that in proceedings against a bankrupt

for contempt for failure to obey an order of the Referee requiring him to turn over money or property to the trustee, such order may be referred to and given the weight to which it is entitled under all the circumstances. But the court should make a new and independent investigation, and should consider all material evidence relating to what preceded as well as to what followed the Referee's report, and from such investigation and principally from such evidence, determine whether or not the bankrupt has the present ability to comply with such order. The authorities that lay down this principle are:

In re Davison (D. C.), 143 Fed. 673.

In re Goodrich, 186 Fed. 5, 106 C. C. A. 207.

In re Cole, 163 Fed. 180, 90 C. C. A. 50.

Samel vs. Dodd, 142 Fed. 68, 73 C. C. A. 254.

Stuart vs. Reynolds, 204 Fed. 712, 715.

The weight of authority supports the last principle. The question has never been passed upon by this court.

When the court is called upon by the zealous representative of the creditors, to imprison an alleged contemnor, the petitioner charging the contempt should be required to prove his allegations

of contempt beyond a reasonable doubt. Examinations of a bankrupt are usually had as soon as he can be haled before the Referee. The excited and anxious creditors, the trustee and his attorney desiring to get hold of all the property possible for the benefit of the creditors and incidently increasing their own fees, regard the bankrupt and his statements and testimony with suspicion. Nothing is resolved in his favor.

In view of the above Findings of Fact V and VI, which are plain and unambiguous, and which were made by the court based on evidence *introduced* on the contempt hearing, to the effect that the respondent did not have the ability at the time of the contempt hearing, or at the time of the making and filing of the Finding of Fact, to turn over said money, or any part of the same, and to the effect that the money had been received by Daniel Fuhrman previous to his being adjudged a bankrupt, and which the court finds it was under his separate control and management, there is nothing before this court for consideration.

We respectfully submit that the judgment of the District Court should be affirmed.

E. H. GUIE,
Attorney for Respondent.

United States
Circuit Court of Appeals

For the Ninth Circuit.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
the LANE LUMBER COMPANY, LIM-
ITED, a Corporation, Bankrupt,

Appellant,

vs.

M. K. WALL,

Appellee.

In the Matter of the LANE LUMBER COMPANY,
Limited, a Corporation, Bankrupt.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Idaho, Northern Division.

FILED

JAN 17 1914



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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On and prior to the 6th day of March, 1911, the said M. K. Wall, this claimant, was the owner of, in possession and entitled to the possession of the following described land situated in the County of Kootenai, State of Idaho, as follows, to wit: The east half of the northwest quarter (E./2 NW./4) of section thirty-five (35), and the southeast quarter of the southwest quarter (SE./4 SW./4) of section twenty-six (26), all in township (49), north of range (2), W. B. M., upon which date the said M. K. Wall made, executed and delivered to the Lane Lumber Company, Limited, bankrupt, a warranty deed for conveying said land to said bankrupt at the agreed consideration of the sum of \$5,000, which said deed was so made, executed and delivered by claimant to said bankrupt upon the following terms and conditions, to wit:

At the time of the execution and delivery thereof, the said bankrupt informed and represented to claimant that it had [1*] practically completed negotiations for mortgaging and bonding certain of its real estate, the description of which is unknown to claimant, and that when said negotiations were completed, it would receive therefrom a large sum of money, and that if claimant would deed to it his said property and deliver possession thereof to it, that it would pay him out of the moneys received from such mortgaging or bonding of its property or a sale of the property deeded by him to it as aforesaid the full sum of \$5,000.00, which was the agreed consideration for the transfer by him to said bank-

*Page-number appearing at foot of page of original certified Record.

rupt of said premises. It was further agreed between said bankrupt and said claimant that the said bankrupt would complete said negotiations for bonding or mortgaging its said property or find a purchaser for the property deeded by claimant to it according to the terms hereinbefore recited, on or before the first day of June, 1911, and that it would pay to him the sum of \$5,000.00, the consideration named for said conveyance on or before June, 1911. That on the 16th day of March, 1911, the said deed was filed for record in the office of the County Recorder of Kootenai County, Idaho, and thereafter recorded in Book 42 of Deeds at page 294, Records of said County, a copy of which deed is hereto attached, hereby referred to, marked Exhibit 1 and made a part hereof. That said claimant put the bankrupt in possession of said lands with the mutual understanding and agreement that efforts would be made by said bankrupt to bond or mortgage its said property as aforesaid, or sell the said property deeded by claimant to it, and that when its said property was so bonded or incumbered, or the land deeded to it by claimant sold, the said bankrupt would pay to claimant the agreed consideration of \$5,000 for the conveyance by him to bankrupt of said premises, and the said claimant did and performed everything agreed to be done and performed by him, and released to the said bankrupt whatever claim or interest he had in said premises or any part [2] thereof by virtue of, in accordance with, and because of said agreement, and delivered possession of said premises to said bankrupt, and on his part the said

contract was fully complied with, which said debt is past due and is now owing by the said bankrupt to claimant, and that no part thereof has been paid.

3. That there are no offsets or counterclaims to said debt, and that this claimant has not, nor has any person by his order or to the knowledge or belief of this deponent, for his use or benefit, had or received any manner of security for said debt whatever, except that pursuant to and by reason of the terms and conditions of said contract and agreement and the performance in full by claimant of *the* all the terms and conditions of said contract and agreement on his part to be done and performed, and said premises hereinbefore described, and the whole thereof and the proceeds of the sale of said property, if sold, were and are appropriated and dedicated to the payment of the agreed consideration for the transfer of said property by claimant to bankrupt, to wit: the sum of \$5,000, and said premises were by said contract and the dealings had by said claimant and said bankrupt with reference thereto as before stated, set aside, dedicated and appropriated to the benefit of claimant, for the purpose of securing said claimant in the payment by said bankrupt to him of the full sum of \$5,000, the agreed consideration therefor, with interest thereon at the rate of 7% per annum from June 1, 1911, to June 20, 1911, and that the said premises, and the whole thereof, were and are impressed with an equitable lien and assignment and appropriation in favor of the claimant to secure him in the payment of said sum of \$5,000 by virtue of the execution and delivery of said deed thereto by

claimant to bankrupt and the performance of all the terms and conditions by claimant on his part to be done and performed, and the failure by said bankrupt to pay to said claimant the consideration for said transfer, and the said claimant had and has, claims and assets, a vendor's lien [3] thereon for so much of the agreed purchase price thereof as remains unpaid and unsecured, to wit, the full sum of \$5,000, and the said claimant has, claims and assets the right and authority to the extent of said sum of \$5,000 to take, remove, sell and dispose of said property and enforce his lien thereon, and it was intended and agreed by and between said bankrupt and claimant at the time of said conveyance that the said real estate hereinbefore described should be and was charged and impressed with a lien in favor of said claimant to secure him in the payment of said sum of \$5,000.

4. That, except as hereinbefore stated, the said claimant's debt remains unsecured.

5. That the said lien so acquired is still in full force and effect and has not been satisfied, nor have said lands or any part thereof been released by claimant from the security thereby given and intended.

6. That no note has been given or received for said debt, nor has any payment been rendered thereon.

7. That on the 29th day of July, 1911, said Lane Lumber Company, Limited, was adjudged an involuntary bankrupt by the Judge of the District Court of the United States for the District of Idaho,

and that thereafter on the 29th day of July, 1911, Lawrence F. Connolly was appointed receiver of the estate of said bankrupt, qualified as such, and took possession of all of the bankrupt's property, and took possession of the property conveyed by claimant to bankrupt and hereinbefore referred to. Thereafter and on the 29th day of July, 1911, an order of reference was made of the above-entitled bankruptcy proceedings by the Judge of said Court, referring said bankruptcy matter to Lawrence L. Lewis, one of the duly appointed referees in bankruptcy in said court, with his office at the city of Coeur d'Alene, Kootenai County. Idaho. Thereafter and on the 18th day of September, 1911, Samuel L. Boyd was appointed by said referee, trustee in bankruptcy of all the real estate and personal [4] property of the said bankrupt; that he thereafter qualified as such trustee, and that all the assets of said bankrupt and the lands deeded as aforesaid by claimant to said bankrupt passed into the control of said bankruptcy court and into the control and possession of said Samuel L. Boyd, as trustee. That on account of the filing of said petition in bankruptcy on, to wit, June 20, 1911, against said bankrupt, and the intervening and subsequent proceedings therein and the appointment of said receiver and trustee to take charge of and dispose of the property of said bankrupt as hereinbefore recited, the said bankrupt was unable to, and failed to complete said negotiations for mortgaging or bonding its said property, and failed and neglected to sell or in any way dispose of the property of the claimant in ac-

cordance with the terms and conditions of said agreement relating thereto, and wholly failed to pay said claimant the sum of \$5,000 or any part thereof, and wholly failed to carry out and perform the terms and conditions of said contract and agreement on its part to be done and performed before or on the 1st day of June, 1911, or at all.

8. That there was a total failure of consideration for the conveyance by claimant to bankrupt of said premises, save and except that the claimant fully performed all things on his part to be done and performed under said agreement and contract, and delivered possession of said premises to the bankrupt.

9. That the said bankruptcy court and the said Lawrence F. Connolly as receiver and trustee, and the said Samuel L. Boyd as trustee, and each thereof, took possession of said property conveyed by claimant to bankrupt, and the whole thereof, subject to the paramount and unsatisfied lien and equities of the claimant, and that the said appropriation and dedication of said property to secure claimant in the payment of said sum of \$5,000, and the said lien of claimant thereover followed the said property at all times, and [5] the said property is still subject to the said lien and equities of claimant, and the said claimant is entitled to enforce his said claim for \$5,000 against the particular property deeded by him to the bankrupt, and against the proceeds of the sale thereof, if a sale is made in said bankruptcy proceedings or by said trustee or by his successor or successors. And the said M. K. Wall, claimant, has, claims and asserts his right to enforce his said lien against

the said property now in the possession of said trustee and to collect the said sum of \$5,000 from said property, or from the proceeds thereof if sold.

10. That the rights of no purchaser or encumbrancer in good faith and for value of said property, or any part thereof, have intervened or have been or can or will be affected in any way by the assertion and enforcement of claimant's said lien against said property or the proceeds thereof if a sale is made.

M. K. WALL.

Subscribed, sworn to and acknowledged by the said M. K. Wall, personally known to me, this 19th day of June, 1912.

[Seal]

FRANK E. LANGLEY.

Notary Public.

United States of America,

State of Idaho,

County of Kootenai,—ss.

On this 29th day of June, 1912, before the undersigned notary public in and for the county and State aforesaid, personally appeared M. K. Wall, to me personally known, who being by me duly sworn, deposes and says: That he resides at Harrison, Idaho, and that he is the claimant who executed the foregoing instrument, and that he executed the same freely and voluntarily for the uses and purposes therein stated.

[Seal]

FRANK LANGLEY,

Notary Public. [6]

51271.

THIS INDENTURE, Made this 6th day of March, in the year of our Lord, one thousand nine

hundred and eleven, BETWEEN Michael K. Wall and Agnes C. Wall, his wife, of Harrison, County of Kootenai, State of Idaho, the parties of the first part, and the Lane Lumber Company, Limited, a corporation, of Harrison, County of Kootenai, State of Idaho, the party of the second part.

WITNESSETH: that the said parties of the first part, for and in consideration of the sum of Five Thousand (\$5000.00) dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell, convey and confirm unto the said party of the second part, and to its heirs, successors and assigns forever, all the following described real estate situated in the county of Kootenai, State of Idaho, to wit:

East one half (E. $\frac{1}{2}$) of the northwest quarter (NW. $\frac{1}{4}$) of section thirty-five (35), and southwest quarter (SW. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) of section twenty-six (26), all in township forty-nine (49), north of range two (2), W. B. M., and containing 120 acres.

TOGETHER with all and singular the tenements hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all estate, right, title and interest in and to the said property, as well in law as in equity, of the said parties of the first part.

TO HAVE AND TO HOLD all and singular, the

above mentioned and described premises, together with the appurtenances, unto the party of the second part, and to its heirs, successors and assigns forever. And the said parties of the first part, and their heirs, the said premises in the quiet and peaceable possession of the said party of the second part, its heirs successors and assigns, [7] against the said part. . of the first part, and their heirs and against all and every person and persons whomsoever, lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seal the day and year first above written.

MICHAEL K. WALL. [Seal]

AGNES C. WALL. [Seal]

Signed, sealed and delivered in the presence of

CHAS. A. ZEIGE.

O. J. BUTLER.

State of Idaho,

County of Kootenai,—ss.

On this 11th day of March, in the year 1911, before me, M. W. Frost, a notary public in and for said county, personally appeared Michael K. Wall and Agnes C. Wall, his wife, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same, and on this day of March, in the year 1911, before me, the officer above described, personally appeared Agnes C. Wall, known to me to be the person whose name is subscribed to the within instrument, described as a married woman, and upon

an examination without the hearing of her husband, I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial seal]

M. W. FROST,
Notary Public, Harrison, Idaho. [8]

State of Idaho,

County of Kootenai,—ss.

I hereby certify that this instrument was filed for record at the request of A. Cook at 32 minutes past 1 o'clock P. M. this 16th day of March, 1911, in my office, and duly recorded in book 42 of deeds at page 294.

D. E. DANBY,

Ex-officio Recorder.

C. A. McDonald,

Deputy.

Fee \$1.50.

State of Idaho,

County of Kootenai,—ss.

I, D. E. Danby, County Recorder in and for the County and State aforesaid, do hereby certify that the foregoing is a full, true and correct copy of the whole thereof of deed from M. K. Wall and wife to Lane Lumber Co., as the same appears of record in my office in book 42 of Deeds, on page 294.

In testimony whereof, I have hereunto set my hand

and affixed my official seal this 19th day of June, 1912.

[Seal]

D. E. DANBY,
County Recorder.
M. C. Quarles,
Deputy. [9]

[Endorsed]: #449. (E) L. In the District Court of the U. S. for the District of Idaho, Northern Division. In the Matter of Lane Lbr. Co., Ltd., a Corporation, Involuntary Bankrupt. Proof of Secured Debt of M. K. Wall, Amount \$5,000.00. Record, p. 1323 to 1363. Filed this 19th day of June, 1912, at 3:20 P. M. L. L. Lewis, Referee. Kiger and Langley, Attorneys for M. K. Wall, Coeur d'Alene, Idaho. Filed December 23, 1913. A. L. Richardson, Clerk. [10]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

Order Allowing Secured Claim of M. K. Wall.

The proof of secured debt of M. K. Wall, a creditor herein, and the objections of Samuel L. Boyd, trustee of said estate, the Northern Trust Company, Union Iron Works, Bank of California, Post, Avery and Higgins, and, all other objections thereto, having come regularly on for hearing, Frank Langley

appearing of counsel for said M. K. Wall, and E. N. La Veine, A. E. Russell, Reed & Boughton and John H. Wourms appearing for the trustee, Bank of California, Post, Avery & Higgins, the petitioning creditors herein, and, Harry L. Day, assignee of the State Bank of Commerce, respectively, H. M. Stephens appearing for the Carnegie Trust Company, and, after argument of respective counsel, the consideration of briefs submitted, the entire matter having been first duly considered and the Court being fully advised in the premises:

IT IS ORDERED that the said objections herein submitted, and each of them, be, and the same are, hereby overruled;

IT IS FURTHER ORDERED that the claim of the said M. K. Wall be, and the same is, hereby allowed in the sum of Five Thousand (\$5,000.00) Dollars;

IT IS FURTHER ORDERED that the said M. K. Wall be, and he is, hereby declared to have a vendor's lien on the east half of the northwest quarter (E. $\frac{1}{2}$ NW. $\frac{1}{4}$) of section thirty-five, and the southeast quarter of the southwest quarter (SE. $\frac{1}{4}$ SW. $\frac{1}{4}$) of section twenty-six (26), township forty-nine (49) north, range two (2), W. B. M., Kootenai County, Idaho, the property of said bankrupt, for the said sum of Five Thousand (\$5,000.00) Dollars, [11] the purchase price thereof;

IT IS FURTHER ORDERED that the said trustee be, and he is, hereby directed to sell in accordance with law and the practice of this Court, the above-described real property, and the whole thereof, and

to apply the proceeds arising from said sale to the payment, satisfaction and discharge of the claim, constituting a vendor's lien on said property, of the said M. K. Wall, the residue and remainder of said proceeds, if any there be, to be passed to the proper fund of said estate;

AND IT IS FURTHER ORDERED that in the event that the above-described land does not sell for sufficient to satisfy and discharge, in full, the claim of the said M. K. Wall for the said sum of Five Thousand (\$5,000.00) Dollars, as herein allowed; then such deficiency, if any there be, be, and the same is, hereby allowed as an unsecured claim against said estate.

Done at Coeur d'Alene, Idaho, in said District, this 31st day of July, A. D. 1913.

LAWRENCE L. LEWIS,

Referee in Bankruptcy.

Service of the within Order is hereby admitted and the receipt of a copy thereof is hereby acknowledged at Coeur d'Alene, Idaho, this 16th day of August, 1913.

E. N. LaVEINE,

Attorney for Samuel L. Boyd, Trustee. [12]

[Endorsed]: #449. In the Matter of the Lane Lumber Company, Limited, Involuntary Bankrupt. Order Allowing Secured Claim of M. K. Wall. Filed as of July 31st, 1913, this 16th day of August, 1913, at 10:30 o'clock A. M. L. L. Lewis, Referee. Filed December 23, 1913. A. L. Richardson, Clerk. [13]

[Petition to Referee in Bankruptcy for Review.]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

PETITION FOR REVIEW ON REFEREE'S
ORDER ALLOWING SECURED CLAIM
OF M. K. WALL IN THE SUM OF \$5,000,
ESTABLISHING A VENDOR'S LIEN.

To Honorable LAWRENCE L. LEWIS, Referee in
Bankruptcy.

Your petitioner respectfully shows:

That he is the duly appointed, qualified and acting
trustee of the Lane Lumber Company, Limited, a
corporation, the above-named bankrupt;

That on June 19, 1912, M. K. Wall filed his proof
of claim of secured debt praying for the Court to
adjudge the amount claimed in said proof of debt,
to wit, \$5,000, as a vendor's lien on the east half
(E. $\frac{1}{2}$) of the northwest quarter (NW. $\frac{1}{4}$) of sec-
tion thirty-five (35), and the southeast quarter
(SE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) of sec-
tion twenty-six (26), township 49 north, range 2, W.
B. M. Kootenai County, Idaho;

That thereafter on August 10, 1912, the trustee
herein filed objections to said proof of debt of M. K.
Wall above referred to;

That thereafter a hearing was had and the matter

was submitted to the referee of the above-entitled court;

That on August 16, 1913, the referee made and entered an order herein decreeing to said M. K. Wall a vendor's lien on the above-described land in the aforesaid amount, a copy of which order is hereto attached and made a part hereof and marked Exhibit "A";

That said order was and is erroneous in that;

1. That claimant is guilty of laches for waiting until after the filing of the petition in bankruptcy herein, which was filed on June 20, 1911, before attempting to assert his pretended [14] vendor's lien;

2. That the title to the property of the bankrupt, including the land described in claimant's said proof of debt, passed to the trustee on September 26, 1911, who was thereupon and *and* still is "Vested with rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings," making the trustee's title paramount to that of the vendor lien claimant;

3. That prior to the filing of said claim, on, to wit, the 16th day of October, 1911, the trustee caused to be filed for record with the County Recorder of Kootenai County, Idaho, a duly certified copy of the Order of Adjudication herein which was recorded in Book Y of Mis. Rec., p. 70, which act vested the title of said east half (E.1/2) of the northwest quarter (NW.1/4) of section thirty-five (35), and the southeast quarter (SE.1/4) of the southwest quarter (SW.1/4) of section twenty-six (26), township 49

north, range 2, W. B. M., absolutely in the trustee, subject only to the valid liens asserted of record;

4. That the sum claimed to be the purchase price was far in excess of the reasonable value of the land described, at the date of the alleged sale; that the purchase price thereof was not authorized by the board of directors;

5. That said transfer was made by claimant, who was an officer of the bankrupt, to wit, secretary thereof, with full knowledge of the embarrassed financial condition of the bankrupt at the time of said transfer; that it was his duty at said time to secure the purchase price, if any purchase price was agreed upon, by action and ratification of the Board of Directors;

6. That claimant, as an officer of the bankrupt, executed that certain mortgage and bond set forth in the secured proof of debt of the Northern Trust Company, # (139) S., filed herein and allowed as a secured debt and by said act waived his said vendor's lien, if any he had, and as against the trustee is estopped from asserting [15] it, for the reason that claimant well knew that said mortgage and bond covered after-acquired property as well as property owned by the bankrupt at the time of the execution of said mortgage and bond;

7. That claimant, as an officer of the bankrupt, permitted said land to remain on the records as unencumbered, except as to the said Northern Trust Company under said mortgage and bond thereby at all times fraudulently misrepresenting to the creditors of the bankrupt, and its trustee, the true financial

condition of the assets of the bankrupt;

8. That claimant's own statement in his proof of debt bars him from the relief sought, among which statements is: "And released to the said bankrupt whatever claim or interest he had in said premises or any part thereof by virtue of, and in accordance with, and because of said agreement, and delivered possession of said premises to bankrupt, and on his part the said contract was fully complied with, which said debt is past due and is now owing by said bankrupt to claimant and that no part thereof has been paid."

9. That no account was ever opened on the books of the bankrupt showing a transfer or purchase of said land;

10. That for the foregoing reasons claimant is estopped from asserting a vendor's lien; that said referee erred in granting and establishing said vendor's lien; that section 47 of the Bankruptcy Act, as amended in 1910, is a bar to the said lien allowed by the referee aforesaid; said order is against the law;

WHEREFORE, your petitioner feeling aggrieved because of such order, prays that the same may be reviewed as provided by the Bankruptcy Act and General Orders.

SAMUEL L. BOYD,
Trustee.

Dated September 3, 1913. [16]
State of Idaho,
County of Kootenai,—ss.

Samuel L. Boyd, the trustee and petitioner mentioned and described in the foregoing petition, does

hereby make solemn oath that the statements contained in the foregoing petition are true according to the best of his knowledge, information and belief.

SAMUEL L. BOYD,
Trustee.

Subscribed and sworn to before me this 3d day of September, 1913.

[Seal] W. F. McNAUGHTON,
Notary Public.

E. N. LaVEINE,
Attorney for Trustee.

J. H. WOURMS,
Attorney for State Bank of Commerce.

POST, AVERY & HIGGINS, and

A. E. RUSSELL,
Attorneys for Bank of California.

H. M. STEVENS,
Attorney for Carnegie Trust Company.

[17]

**Exhibit "A"—Order Allowing Secured Claim of
M. K. Wall.**

*In the District Court of the United States for the
District of Idaho, Northern Division.*

#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

The proof of secured debt of M. K. Wall, a creditor herein, and the objections of Samuel L. Boyd, trustee

of said estate, the Northern Trust Company, Union Iron Works, Bank of California, Post, Avery & Higgins, and, all other objections thereto, having come regularly on for hearing, Frank Langley appearing of counsel for said M. K. Wall, and E. N. LaVeine, A. E. Russell, Reed & Boughton and John H. Wourms appearing for the trustee, Bank of California, Post, Avery & Higgins, the petitioning creditors herein, and Harry L. Day, assignee of the State Bank of Commerce, respectively, H. M. Stephens appearing for the Carnegie Trust Company, and, after argument of respective counsel, the consideration of briefs submitted the entire matter having been first duly considered and the Court being fully advised in the premises.

IT IS ORDERED that the said objections herein submitted, and each of them, be and the same are, hereby overruled;

IT IS FURTHER ORDERED that the claim of the said M. K. Wall be, and the same is, hereby allowed in the sum of Five Thousand (\$5,000) Dollars;

IT IS FURTHER ORDERED that the said M. K. Wall be, and he is, hereby declared to have a vendor's lien on the east half of the northwest quarter (E.1/2) (NW.1/4) of section thirty-five (35) and the southeast quarter (SE.1/4) of the southwest quarter (SW.1/4) of section twenty-six (26), township forty-nine (49) north, range two (2) W. B., Kootenai County, Idaho, the property [18] of said bankrupt, for the said sum of Five Thousand (\$5,000) Dollars, the purchase price thereof;

IT IS FURTHER ORDERED that the said

trustee be, and he is, hereby directed to sell in accordance with law and the practice of this Court, the above-described real property, and the whole thereof, and to apply the proceeds arising from said sale to the payment, satisfaction and discharge of the claim, constituting a vendor's lien on said property, of the said M. K. Wall, the residue and remainder of said proceeds, if any there be, to be passed to the proper fund of said estate;

AND IT IS FURTHER ORDERED that in the event that the above-described land does not sell for sufficient to satisfy and discharge, in full, the claim of the said M. K. Wall for the said sum of Five Thousand (\$5,000) Dollars, as herein allowed, then such deficiency, if any there be, be, and the same is, allowed as an unsecured claim against the said estate;

Done at Coeur d'Alene, Idaho, in said District, this 31st day of July, A. D. 1913

LAWRENCE L. LEWIS,
Referee in Bankruptcy. [19]

[Endorsed]: No. 449. In the District Court of the United States for the District of Idaho, Northern Division. In the Matter of Lane Lumber Company, Limited, a Corporation, Involuntary Bankrupt. Petition for Review of Referee's Order Allowing Secured Claim of M. K. Wall, in the sum of \$5,000 Establishing a Vendor's Lien. Before Lawrence L. Lewis, Referee in Bankruptcy. E. N. LaVeine, Attorney for Trustee. Residence and P. O. Coeur d'Alene, Idaho. Filed this 3d day of September, 1913, at 5:30 P. M. L. L. Lewis, Referee. Filed December 23, 1913. A. L. Richardson, Clerk. [20]

Report of Referee.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

IN BANKRUPTCY—No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt,

REPORT OF REFEREE IN BANKRUPTCY OF
AN ORDER ALLOWING SECURED CLAIM
OF M. K. WALL IN THE SUM OF \$5,000
AND ESTABLISHING VENDOR'S LIEN.

To the Honorable FRANK S. DIETRICH, District
Judge:

I, Lawrence L. Lewis, Referee in Bankruptcy, in
charge of the above-entitled proceedings, do hereby
certify:

1.

That in the course of said proceedings, on, to
wit, the 31st day of July, 1913, an order was made
and filed herein allowing the claim of M. K. Wall
in the sum of Five Thousand (\$5,000.00) Dollars,
and establishing a vendor's lien on the real property
described in said order for said amount.

2.

That thereafter on, to wit, the 3d day of September, 1913, Samuel L. Boyd, trustee of the above-entitled estate, feeling aggrieved thereat, filed herein his petition for review, which said petition was duly granted.

3.

That a full, true and correct summary of the proceedings on which said order was made and based is as follows, to wit:

On, to wit, the 19th day of June, 1912, the claim of secured debt of M. K. Wall in the sum of Five Thousand (\$5,000.00) was duly filed herein; that thereafter on, to wit, the 10th day of August, 1912, the objections of the trustee thereto were duly filed in [21] said cause; that thereafter on, to wit, the 14th day of October, 1912, said proof of secured claim and the trustee's objections thereto came regularly on for hearing (See Record of Proceedings, Pages, 1320 to 1363, both inclusive): that thereafter the brief of the trustee herein, the brief of M. K. Wall, the said claimant, and the brief of Post, Avery Higgins, et al., were respectively filed in said cause after oral argument of the issues involved; and that thereafter the entire matter having been first taken under advisement, the said order of the 31st day of July, 1913, was duly made and filed in said cause (a copy of which said order is attached to the petition for review on the file herein and marked Exhibit "A"), to which said order the trustee herein duly excepted and submits that such order was and is erroneous in ten different particulars, which said particulars are fully set forth in his said Petition for Review.

THE PRECISE QUESTIONS SUBMITTED for consideration and decision are these:

1. Is the claimant, M. K. Wall, estopped by laches, or otherwise, from asserting a vendor's lien against the land set forth and described in said order,

under and by virtue of sections 3441 and 3443 of the Idaho Revised Codes?

2. Do sections 3441 and 3443 of the Idaho Revised Codes, providing for a vendor's lien against real property for the purchase price, or any part thereof, take precedence over the lien of the trustee in bankruptcy as provided in section 47 of the Bankruptcy Act of 1898, as amended in 1910? That is, does section 47 of the Act of 1898, as amended in 1910, operate as a bar to the assertion of a vendor's lien by M. K. Wall, the said claimant, as provided for in sections 3441 and 3443 of the Idaho Revised Codes?

3. Is the order from which this review is taken erroneous in point of law?

I hand up herewith, for the information of the Judge, the [22] following records, files and papers, to wit:

1. Petition for Review.
2. Record of Proceedings, pages 1320 to 1363, both inclusive.
3. Order Allowing Secured Claim of M. K. Wall.
4. Proof of Secured Debt of M. K. Wall; and, the Trustee's objections thereto.
5. Brief of Claimant.
6. Brief of Trustee.
7. Brief of Post, Avery & Higgins, Supporting Objections.

I HEREBY FURTHER CERTIFY that the above and foregoing are all the papers, records or files used or pertaining to this review.

Done at Coeur d'Alene, Idaho, in said District,
this 18th day of November, A. D. 1913.

Respectfully submitted,

LAWRENCE L. LEWIS,

Referee in Bankruptcy. [23]

[Endorsed]: No. 449. In the District Court of the United States for the District of Idaho, Northern Division. In the Matter of the Lane Lumber Company, Limited, a corporation, Involuntary Bankrupt. Report of Referee on an Order Allowing Secured Claim of M. K. Wall in the Sum of \$5,000, and Establishing a Vendor's Lien. Lawrence L. Lewis, Referee in Bankruptcy. Filed this 19th day of November, 1913, at 2 o'clock P. M. A. L. Richardson, Clerk. [24]

— ffl

*In the United States District Court for the District
of Idaho, Northern Division.*

In the Matter of the LANE LUMBER COMPANY,
a Corporation, Bankrupt.

Dec. 2, 1913.

E. N. LaVEINE, Attorney for Trustee.

FRANK LANGLEY, Attorney for Claimants.

Memorandum Decision.

MEMORANDUM DECISION COVERING PETITION FOR REVIEW BROUGHT BY THE TRUSTEE AND INVOLVING THE VALIDITY OF THREE VENDORS LIEN CLAIMS, NAMELY, THOSE OF M. K.

WALL, JOSEPH BROWN, AND MARY WALL.

DIETRICH, District Judge:

The one question submitted by the trustee upon these several petitions is whether or not the vendor of real estate in Idaho has and may maintain a lien for the unpaid purchase price upon land sold, after an adjudication in bankruptcy against the vendee, the vendor having, prior to the institution of the bankruptcy proceedings, commenced no action to foreclose the lien.

It is conceded that such liens are recognized and established by the statutes of the State. Section 3441 of the Idaho Revised Codes is as follows: "One who sells real property has a vendor's lien thereon independent of possession for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." And section 3443: "The [25] liens of vendors and purchasers of real property are valid against everyone claiming under the debtor except a purchaser or incumbrancer in good faith and for value."

It is unnecessary to relate the facts involved, for the trustee concedes that such liens originally vested in the several vendors, the claimants here, which, if lost or divested at all have been so lost or divested by reason of the institution of the bankruptcy proceeding, and for no other cause. Indeed, the question for consideration is still further limited by the express concession on the part of the trustee, "that prior to the amendment to the bankruptcy act of 1910, amending section 47, the vendor's lien might

be established." We need, therefore, expressly decide only whether, upon the institution of a bankruptcy proceeding, the provisions of this amendment automatically operate to nullify or extinguish a pre-existing, valid vendor's lien. Section 47, so far as pertinent, is as follows, the amendatory language being underscored:

"Sec. 47a. Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estate; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied." [26]

It will be noted that the amendment does not in terms purport to act upon liens or to prescribe the conditions under which they may be either created or enforced; it defines the status of a trustee in bankruptcy, and declares the scope of his rights and remedies. As suggested by counsel for the trustee here, not unlikely the controlling purpose of the

amendment was, to relieve trustees from the disability imposed by the rule adopted by the courts, notably in such cases as *In re Economical Printing Co.*, 110 Fed. 514, and *York Mfg. Co. vs. Cassell*, 201 U. S. 304. But this rule relates not only to the validity of certain classes of liens under the State laws, but only to the right of the trustee to question claims that are defective or invalid under such laws. The rule is now, as it always has been, that with certain exceptions immaterial to the present inquiry, liens created by authority of, and in compliance with, the statutes of a State will be recognized and sustained in bankruptcy proceedings. The amendment of section 47 has in no wise affected this rule. *Love-land on Bankruptcy* (4th ed.), sec. 372. There is nothing in *Pacific State Bank vs. Coates*, 205 Fed. 618, out of harmony with this view. "Liens given or accepted in good faith and not in contemplation or in fraud upon the Act, and for a present consideration, and which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act." (Sec. 67d.) It is not questioned that these claims are in good faith, and that the liens were for a present consideration, and that no record thereof was required by the State statutes; as already stated, it is conceded that at the moment the bankruptcy proceeding was instituted the claims were valid subsisting liens. The act declares only that, "Claims which, for want of record or for other reasons, would not have been valid liens as against the claims of cred-

itors of the [27] bankrupt, shall be liens against his estate." (Sec. 67a.) Here, then, is the test: Were these liens invalid against the creditors of the bankrupt merely because they were not recorded? If they were, then the trustee might, under the amendment to section 47, challenge them; his right so to do is conferred by the amendment, and that is its only purpose and effect; it does not operate directly upon the claims of lien. Now, as we have seen, under the Idaho statute a vendor's lien, though unrecorded, is valid as against all the world, excepting only "a purchaser or incumbrancer in good faith and for value." Unless, therefore, a trustee has, by virtue of the amendment to section 47 of the bankruptcy act, the status of such a purchaser or incumbrancer, he cannot assail the lien, for under the law it has validity against all other claims. The controversy is therefore reduced to the question merely of the meaning of the clause in the State statute, "purchaser or incumbrancer in good faith and for value." At most, if we assume that the lands here are in the custody of the Court the trustee has the status only of a "creditor holding a lien by legal or equitable proceedings thereon," as, for example, the plaintiff in an attachment suit, or a judgment creditor after a levy of execution. But such a creditor is not a purchaser, nor is he an incumbrancer in good faith and for value. A citation of authorities upon this proposition is scarcely necessary.

The purpose and scope of the amendment, and the distinction between the claims here and cases to which it was intended to apply may be illustrated

by reference to another provision of the Idaho statutes: In section 3408 of the Revised Statutes it is declared that unless a chattel mortgage is executed with the formalities therein prescribed and filed for public record, it is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for [28] value. Differing from vendor's liens, it will be observed, such an unrecorded mortgage is void not only against purchasers and incumbrancers, but against "creditors." Prior to the amendment of section 47, it was quite generally held that a trustee in bankruptcy could not, upon behalf of general creditors, assail the validity of such an instrument, because such creditors, having no specific lien upon the property, were in no position to make the attack, and therefore the trustee, acting upon their behalf, could assert no better right. In *re Economical Printing Co.*, 110 Fed. 514, Remington on Bankruptcy, sections 1207-1/2 to 1210. The amendment meets this emergency by conferring upon him the status of a creditor who has such lien, and may therefore object to the assertion of a lien under an unrecorded mortgage. See, also, section 3170, which provides that transfers of personal property not accompanied by delivery of possession to the transferee are void not only against incumbrancers and purchasers, but also against "creditors." Possibly Congress might have conferred upon trustees all the rights and remedies of a purchaser or incumbrancer for value and in good faith, but it has not done so; it has chosen to limit such rights and remedies to those of one holding a

lien arising out of legal or equitable proceedings.

It is unimportant that the claimants did not commence actions to foreclose their liens prior to the institution of the bankruptcy proceedings. A suit to foreclose a lien is not material to its validity. The lien is established by operation of law, and is quite as complete before as after the institution of the proceedings to foreclose it.

It follows that the referee was right in holding that as a matter of law the claimants were entitled to liens. The record suggests some other questions, such as whether the claimants, or any of them, are estopped to assert their claims, or whether the [29] trustee should be subrogated to the rights of the mortgagee or trustee in a trust deed securing a large issue of bonds covering these and other lands, which indebtedness the trustee has now paid, but they have not been argued, and I therefore express no opinion relative thereto. The order of the referee will in each case be affirmed. [30]

[Endorsed]: No. 449. In the U. S. District Court for the District of Idaho, Northern Division. In the Matter of the Lane Lumber Company, Bankrupt. Memorandum Decision Covering {Petition for Review Brought by the Trustee and Involving the Validity of Three Vendors' Lien Claims, Namely, Those of M. K. Wall, Joseph Brown, and Mary Wall. Filed December 2, 1913. A. L. Richardson, Clerk. [31]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

IN BANKRUPTCY—#449.

M. K. WALL VENDOR LIEN CLAIM OF \$5,000.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

Findings of Fact and Conclusions of Law.

The vendor lien claim of M. K. Wall in the sum of \$5,000 came on regularly for hearing before the Court without a jury, on petition of the trustee for review of the order made herein by the referee, from the facts presented by the pleadings and the records, the Court finds the facts as follows, to wit:

I.

That on March 6, 1911, M. K. Wall, the claimant herein, sold and conveyed to the Lane Lumber Company, Limited, a corporation, bankrupt above named, by warranty deed, for the price of \$5,000, the east half of the northwest quarter (E.½ NW.¼) of section 35, and the southeast quarter of the southwest quarter (SE.¼ SW.¼) of section 26, twp. 49, north, range 2, W. B. M., Kootenai County, State of Idaho; that no part of said price has ever been paid; and that there is now, and was on, to wit, the 20th day of June, 1911, the date of filing of the petition against said bankrupt, due and owing on said purchase price from the bankrupt to M. K. Wall, the said claimant, the sum of \$5,000, which said sum is, and was at

all times hereinbefore mentioned, wholly unpaid and unsecured otherwise than by the personal obligation of the buyer, the said Lane Lumber Company, Ltd.

II.

That on July 29, 1911, the said Lane Lumber Company, Ltd., was adjudged an involuntary bankrupt.
[32]

III.

That on September 22, 1911, Samuel L. Boyd qualified as trustee of the estate of said bankrupt, and has continued to and is now acting as such trustee.

IV.

That on June 19, 1912, M. K. Wall, the claimant, filed herein his proof of secured debt claiming \$5,000 as a vendor's lien against property of the bankrupt described as the east half of the northwest quarter (E.1/2 NW.1/4) of section 35, and the southeast quarter of the southwest quarter (SE.1/4 SW.1/4) of section 26, twp. 49 north. range 2, W. B. M., Kootenai County, State of Idaho.

V.

That on August 10, 1912, the trustee filed objections to said proof of debt.

VI.

That on July 31, 1913, the Honorable Lawrence L. Lewis, Referee herein, made and filed an order overruling said objections and allowing said claim as a secured claim and a vendor's lien.

VII.

That on September 3, 1913, the attorney for the trustee filed his petition for review of the order of the referee allowing said claim in the sum of \$5,000

establishing a vendor's lien upon said lands.

VIII.

That on November 19, 1913, the referee filed his report with the clerk of this court bearing upon said claim, and therewith transmitted all of the papers above mentioned and the record of the proceedings had before the referee herein being pages 1320 to 1363, inclusive.

IX.

That the claimant is not guilty of laches for waiting until after the filing of the petition in bankruptcy on June 20, 1911, before attempting to assert his vendor's lien. [33]

X.

That the title to all of the property of the bankrupt, including the lands described in claimant's vendor's lien, passed to the trustee on September 26, 1911, who was thereupon and is still "vested with rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings," but that such "rights," etc., are subordinate to said M. K. Wall's vendor's lien.

XI.

That the trustee had no notice of said vendor's lien until it was filed with the referee herein.

XII.

That the appraised value of the lands on which the vendor's lien is claimed placed thereon by the appraisers is \$919.00.

XIII.

That the purchase thereof was not authorized by

the Board of Directors of the bankrupt corporation.

XIV.

That M. K. Wall, the claimant, was secretary of the bankrupt, with full knowledge of the embarrassed financial condition of the bankrupt at the time of said transfer, which said transfer was not ratified by the Board of Directors.

XV.

That M. K. Wall, as an officer of the bankrupt, executed a certain mortgage and bond dated in 1908, originally for the sum of \$125,000, filed and allowed herein, which has been paid in full by the trustee.

XVI.

That M. K. Wall, as an officer of the bankrupt, permitted said land to remain on the records as unincumbered.

Conclusions of Law.

As a conclusion of law from the foregoing facts, the Court finds that the referee's order complained of by the trustee should be affirmed and said vendor's lien decreed on the property described [34] therein under sections 3441 and 3443, I. R. C., and under the Bankruptcy Act of 1898 and amendments.

Dated December 13th, 1913.

FRANK S. DIETRICH,

District Judge.

The foregoing findings are made in response to a suggestion of counsel for the trustee as a statement of the facts and of the theory upon which the order of December 2d, 1913, is made, affirming referee's order.

Done this December 13, 1913.

FRANK S. DIETRICH,

Judge.

[Endorsed]: No. 449. In the District Court of the United States for the District of Idaho, Northern Division. In the Matter of the Lane Lumber Company, Ltd., a Corporation, Involuntary Bankrupt. Findings of Fact and Conclusions of Law on Secured Debt of M. K. Wall for \$5,000. Filed December 13, 1913. A. L. Richardson, Clerk. [35]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

IN BANKRUPTCY—No. 449.

M. K. WALL VENDOR LIEN CLAIM OF \$5,000.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

Judgment.

In the above-entitled matter the petition of the trustee in bankruptcy for the review of an order of the reference in bankruptcy recognizing and allowing the claim of M. K. Wall for \$5,000.00 as a lien (vendor's) upon the east half of the northwest quarter of section 35, and the southeast quarter of the southwest quarter of section 26, township 49 north, range 2 west of Boise Meridian, Kootenai County, State of Idaho, under sections 3441 and 3443 of the Idaho Revised Codes, and under the bankruptcy act as amended, came on to be heard and was

argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that said order of the referee be, and the same is, hereby affirmed.

Dated this 23d day of December, 1913,

FRANK S. DIETRICH,

Judge. [36]

[Endorsed]: No. 449. In the District Court of the United States for the District of Idaho, Northern Division. In the Matter of the Lane Lumber Company, Limited, a Corporation, Bankrupt. In Bankruptcy—No. 449. M. K. Wall Vendor Lien Claim of \$5,000.00. Judgment. Filed December 23, 1913. A. L. Richardson, Clerk. [37]

In the District Court of the United States for the District of Idaho, Northern Division.

#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

Petition by Trustee for Appeal and Order Allowing Same.

PETITION ON APPEAL OF SAMUEL L. BOYD,
TRUSTEE IN BANKRUPTCY, OF THE
LANE LUMBER COMPANY, LIMITED A
CORPORATION, BANKRUPT.

To the Honorable F. S. DIETRICH, District Judge
of the District Court of the United States for
the District of Idaho, Northern Division:

Samuel L. Boyd, the duly appointed, qualified and

acting trustee of the above-named bankrupt, conceiving himself, as such trustee, and the unsecured creditors of the above-named bankrupt, aggrieved by the judgment made and entered on the 23d day of December, 1913, in the above-entitled matter, affirming the referee herein and establishing a vendor's lien in favor of M. K. Wall, in the sum of \$5,000, on the east half of the northwest quarter (E.1/2 NW.1/4) of section 35, and the southeast quarter of the southwest quarter (SE. 1/4 SW. 1/4) of section 26, twp. 49 north, range 2, W. B. M., Kootenai County, State of Idaho, does hereby appeal from such judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reason specified in the Assignment of Error, which is filed herewith, and he prays that this Appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the [38] Ninth Circuit.

E. N. LAVEINE,
Attorney for Samuel L. Boyd, Trustee of the Lane
Lumber Co., Ltd., a Corporation, Bankrupt.

I hereby waive citation.

FRANK LANGLEY,
Attorney for M. K. Wall.
The foregoing claim of appeal is allowed.

FRANK S. DIETRICH,
District Judge.

Dated December 23d, 1913.

Filed December 23, 1913. A. L. Richardson,
Clerk. [39]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

Assignments of Error by Trustee.

ASSIGNMENTS OF ERROR, BY TRUSTEE TO
ALLOWANCE OF CLAIM OF M. K. WALL,
AS A VENDOR'S LIEN, IN THE SUM OF
\$5,000.

Comes now, Samuel L. Boyd, as trustee in bankruptcy of the Lane Lumber Company, Limited, a corporation, bankrupt, by E. N. LaVeine, his attorney, and says that the judgment in said matter creating said vendor's lien is erroneous and against the just rights of said trustee, and the creditors of the bankrupt, for the following reasons:

FIRST: Because M. K. Wall, as secretary of the bankrupt, had full knowledge of its embarrassed financial condition at the time of the transfer to the bankrupt of the land upon which said vendor's lien claim has been established, which transfer was not authorized or ratified by the Board of Directors of the bankrupt; that as an officer he permitted the land in controversy to remain unincumbered until long after bankruptcy, in so far as his legal title or equity therein was concerned; that he waited until

after the qualification of the trustee, on September 22d, 1911, before attempting to assert his purported vendor's lien; that on account of his said laches he is estopped from asserting said vendor's lien against the trustee.

SECOND: Because the statutes of the State of Idaho, secs. 3441 and 3443 Idaho Revised Codes, under which M. K. Wall's, [40] \$5,000 vendor lien claim was sustained, had no application to the facts and the law upon which the Court sustained said lien, as against the trustee's title.

THIRD: Because the trustee in bankruptcy, under the Bankruptcy Act, had greater rights as against said M. K. Wall and his claim for vendor's lien than the bankrupt itself.

FOURTH: Because under the Bankruptcy Act the trustee was vested with title to said land paramount to that of the vendor lien claimant.

FIFTH: Because the findings, judgment and decree of this Court sustaining the action of the referee, allowing said claim for \$5,000, as a vendor's lien, is erroneous, illegal and against the law.

WHEREFORE, the said Samuel L. Boyd, trustee in bankruptcy, of the said Lane Lumber Company, Limited, a corporation, bankrupt, prays that said order judgment and decree, affirming the action and ruling of the referee allowing the claim of said M. K. Wall, as a vendor's lien, in the sum of \$5,000, be reversed, and that the Court may be directed to enter a decree reversing the action of the referee in

establishing said vendor's lien.

E. N. LaVEINE,
Attorney for Samuel L. Boyd, Trustee of the Lane
Lumber Co., Ltd., a Corporation, Bankrupt.

Filed December 23, 1913. A. L. Richardson,
Clerk. [41]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

Praeipie [for Transcript of Record].

PRAECIPE, BY TRUSTEE, FOR TRANSCRIPT
OF RECORD ON M. K. WALL, VENDOR
LIEN CLAIM, IN THE SUM OF \$5,000.

To Honorable A. L. RICHARDSON, Clerk of the
United States District Court:

You are hereby respectfully requested to prepare
a transcript of the following described papers with
the date of filing endorsed thereon, in the above-
entitled proceeding:

1. M. K. Wall's proof of secured debt, for \$5,000,
with exhibits attached thereto, filed with the referee
on June 19, 1912.

2. Order of referee allowing said proof of secured
debt for \$5,000, filed by the referee as of July 31,
1913, on the 16th day of August, 1913.

3. Petition, by trustee, for review of referee's

said order, filed with the referee on September 3, 1913.

4. Report of referee, Lawrence L. Lewis, on his order allowing above claim, filed with the Clerk of the United States District Court on November 19, 1913.

5. Memorandum decision of the District Judge filed December 2, 1913, affirming order of referee filed as of July 31, on the 16th day of August, 1913, allowing said claim as a vendor's lien.

6. Findings of fact and conclusions of law, by District Judge, filed December 13, 1913. [42]

7. Judgment or decree by District Judge, filed December, 1913.

8. Petition for appeal by trustee and order allowing same, filed December 23d, 1913.

9. Assignments of error, by trustee, filed December 23d, 1913.

10. This praecipe, with attached stipulation, filed December 23d, 1913.

Dated December 23d, 1913.

E. N. LaVEINE,

Attorney for Samuel L. Boyd, Trustee. [43]

[Stipulation as to Transcript of Record on Appeal.]

In order to facilitate the appeal, in this matter, it is hereby stipulated between Frank Langley, attorney for claimant, M. K. Wall, and E. N. LaVeine, attorney for Samuel L. Boyd, trustee, that the papers included in the foregoing praecipe, when certified by the Clerk of this court, shall constitute the transcript of Record on appeal to the Circuit Court of Appeals.

It is expressly agreed and understood that the lien claimant, M. K. Wall, by his stipulation herein does not waive his right to move to dismiss this appeal on the ground that the matter involved should be presented by petition for revision instead of appeal.

FRANK LANGLEY,

Attorney for M. K. Wall, Claimant.

Address: Coeur d'Alene, Idaho, Otterson Bldg.

E. N. LaVEINE,

Attorney for Samuel L. Boyd, Trustee.

Address: Coeur d'Alene, Idaho, Giguere Bldg.

[Endorsed]: No. 449. In the District Court of the United States for the District of Idaho, Northern Division. In the Matter of the Lane Lumber Company, Limited, a Corporation, Bankrupt. In re M. K. Wall Vendor Lien Claim for \$5,000. Petition by Trustee for Appeal, Order Allowing the Same, Assignments of Error, Praecipe. Filed December 23, 1913. A. L. Richardson, Clerk. E. N. LaVeine, Attorney for Trustee, Address, Coeur d'Alene, Idaho. [44]

Return to Record.

On presentation of the foregoing, it is ordered by the Court that a transcript of the record, as above stipulated, be transmitted to the United States Circuit Court of Appeals, for the Ninth Circuit, and the same is transmitted accordingly.

[Seal]

Attest: A. L. RICHARDSON,

Clerk. [45]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

*In the District Court of the United States for the
District of Idaho, Northern Division.*

#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript consisting of M. K. Wall's proof of secured debt, for \$5,000, with exhibits attached thereto; order of referee allowing said proof of secured debt for \$5,000; petition by trustee for review of referee's said order; report of referee, Lawrence L. Lewis, on his order allowing said claim; memorandum decision, by the District Judge; findings of fact and conclusions of law by the District Judge; judgment or decree by the District Judge; petition for appeal, by the trustee, and order allowing same; assignments of error, by trustee, praecipe, with attached stipulation, each and all to be full, true and correct copies of the pleadings and proceedings in the above-entitled matter, prepared according to the praecipe heretofore set forth, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$27.70, and that the same has

been paid by the appellant.

Witness my hand and the seal of said District Court affixed at Boise, Idaho, this 26th day of December, 1913.

[Seal]

A. L. RICHARDSON,
Clerk. [46]

[Endorsed]: No. 2363. United States Circuit Court of Appeals for the Ninth Circuit. Samuel L. Boyd, as Trustee in Bankruptcy of the Lane Lumber Company, Limited, a Corporation, Bankrupt, Appellant, vs. M. K. Wall, Appellee. In the Matter of the Lane Lumber Company, Limited, a Corporation, Bankrupt. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Received and filed December 29, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt,
Appellant,

v.

M. K. WALL, Appellee.

In the Matter of THE LANE LUMBER COM-
PANY, LIMITED, a Corporation, Involuntary
Bankrupt.

Upon appeal from the United States District Court
for the District of Idaho, Northern Division.

Brief of Appellant, Samuel L. Boyd, Trustee.

E. N. LA VEINE,
Attorney for Appellant,
Samuel L. Boyd, Trustee
Coeur d'Alene, Idaho,

JOHN H. WOURMS,
Amicus Curiae.
Wallace, Idaho,

Filed this.....day of February, 1914.

FILED

.....
Clerk.

15 - 1914

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt,

Appellant,

v.

M. K. WALL,

Appellee.

In the Matter of THE LANE LUMBER COMPANY, LIMITED, a Corporation, Involuntary Bankrupt.

Upon appeal from the United States District Court
for the District of Idaho, Northern Division.

Brief of Appellant, Samuel L. Boyd, Trustee.

E. N. LA VEINE,
Attorney for Appellant,
Samuel L. Boyd, Trustee
Coeur d'Alene, Idaho,

JOHN H. WOURMS,
Amicus Curiae.
Wallace, Idaho,

THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMIT-
ED, a Corporation, Bankrupt,

Appellant,

v.

M. K. WALL,

Appellee.

In the Matter of THE LANE LUMBER COM-
PANY, LIMITED, a Corporation, Involuntary
Bankrupt.

Upon appeal from the United States District Court
for the District of Idaho, Northern Division.

STATEMENT OF THE CASE.

The respondent, M. K. Wall, claims an unrecorded vendor's lien on certain property belonging to the bankrupt, which has been resisted by the trustee, the proceedings thereon are as follows:

On June 20, 1911, a petition was filed, by various creditors to have the Lane Lumber Company, Limited, a corporation, adjudged a bankrupt, (Trans. p. 34), July 29, 1911, the Lane Lumber Company was adjudged a bankrupt. (Trans. p. 33) On March 6, 1911, M. K. Wall conveyed to the said Lane Lumber Company the E $\frac{1}{2}$ NW $\frac{1}{4}$, of Section 35, SE $\frac{1}{4}$ SW $\frac{1}{4}$

of Section 26, Twp. 49 North, Range 2, W. B. M., Kootenai County, Idaho, for the agreed purchase price of \$5000. (Trans. p. 32). M. K. Wall was secretary of the bankrupt, with full knowledge of the embarrassed financial condition, of the bankrupt, at the time of said transfer, which purchase and transfer was not authorized or ratified by the board of directors of the Lane Lumber Company. (Trans. p. 35). M. K. Wall, as an officer of the bankrupt, permitted said land to remain on the records unincumbered, except as to that certain mortgage and bond given to the Northern Trust Company and Augustus S. Peabody in 1908, originally for the sum of \$125,000, which included after acquired property, which mortgage has been paid in full by the trustee. (Trans. p. 35). On September 22, 1911, Samuel L. Boyd qualified as trustee of the bankrupt and has continued to and is now acting as trustee. (Trans. p. 33) The trustee had no notice of said vendor's lien until it was filed with the Referee, Lawrence L. Lewis. (Trans. p. 34). On June 19, 1912, M. K. Wall filed his proof of secured debt, claiming \$5000 as a vendor's lien against the above described property of the bankrupt, (Trans. p. 33) under Sections 3441 and 3443, Idaho Revised Codes, which are in words and figures as follows:

"Sec. 3441. One who sells real property has a vendor's lien thereon, independent of possession, for

so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

"Sec. 3443. The liens of vendors and purchasers of real property are valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value."

The appraised value of the land on which the vendor's lien is claimed, placed thereon by the appraisers, appointed by the court, is \$919. (Trans. p. 34). That on August 10, 1912, the trustee filed objections to the aforesaid proof of secured debt. (Trans. p. 23). The referee, overruled the objections and allowed the proof of secured debt, as a vendor's lien, on July 31, 1913. (Trans. p. 19). Petition for review was filed by the trustee September 3, 1913. (Trans. p. 15). November 19, 1913, the Referee filed his report thereon, with the Clerk of the U. S. District Court. (Trans. p. 22). Hon. F. S. Dietrich, U. S. District Judge, after hearing, on December 2, 1913, rendered his memorandum decision affirming the referee in establishing said vendor's lien. (Trans. p. 25). Findings of Fact and Conclusions of Law, (Trans. p. 32) were caused to be filed by said District Judge on December 13, 1913, and Judgment thereon was filed December 23, 1913. (Trans. p. 36).

ASSIGNMENTS OF ERROR.

1. The court error in not deciding that M. K.

Wall, was estopped from asserting vendor's lien on account of his laches and his official relation to the bankrupt.

2. The court erred in sustaining the M. K. Wall vendor's lien claim, under Section 3441 and 3443, Idaho Revised Codes, against the contention of the trustee.

3. The court erred in not deciding that the trustee, under the Bankruptcy Act, held title to the land in controversy, paramount to M. K. Wall's vendor lien right.

4. That the court erred in not denying said vendor's lien.

5. That the decree of the District Court allowing said vendor's lien is against the law.

ARGUMENT.

REFERRING TO THE FIRST ASSIGNMENT OF ERROR.

It is very apparent from the vendor lien claims pending against this estate that the vendor lien claimant, M. K. Wall, Secretary of the Bankrupt, for and on behalf of the bankrupt, was extremely active and zealous in obtaining titles to tracts of land by making small payments thereon and not protecting the vendors by collateral security. He knew the financial condition of the company. It must have been his ambition to make millions. He knew when he transferred his land to the bankrupt that the

credit world had a right to and would assume that ^{he} ~~the vendors~~ had been paid in full for ^{his} ~~their~~ land.

His very relation with the company and to its creditors, on account of the fraud worked upon them, should estop him from claiming his vendor's lien and defeated his right thereto.

When the trustee qualified on September 22, 1911, he took possession of the land covered by the purported vendor lien, retained the undisputed title thereto, administered and paid the taxes thereon, until the M. K. Wall vendor lien sprung up in June, 1912.

Extraordinary attacks against the title of the trustee and the uniform operation of the bankruptcy act has met with the disapproval of the Courts.

"A creditor of a bankrupt firm, even if entitled to maintain a petition to vacate the adjudication, cannot do so after the lapse of eight months, during which other rights have intervened, and without showing a good reason for the delay; and an ^{all-}obligation that the facts stated in the petition have become known to him only recently is insufficient "

In re Ives 113 F. 911, C. C. A. 6th Circuit

REFERRING TO THE SECOND, THIRD,
FOURTH AND FIFTH ASSIGNMENTS OF
ERROR.

Art. 1, §8 Cl. 4 of the Constitution of the United

States, provides that Congress shall have power: "To establish a uniform rule of naturalization, and uniform laws on the subject of Bankruptcies throughout the United States."

"Congress is not forbidden to pass laws impairing the obligation of contracts, and a bankrupt act may provide for the discharge of a bankrupt from debts contracted before its passage and may destroy liens upon the bankrupt's property, whether created by contract, by statute or by judgment." There is no dispute as to this principle of law.

IT IS THE EVIL OF SECRET LIENS AND THE INJUSTICE WORKED UPON CREDITORS, WHO RELY UPON THE DEBTORS APPARENT OWNERSHIP, AGAINST WHICH THE BANKRUPTCY LAW HAS SET ITS FACE.

"HOW FAR ADOPTED IN THIS COUNTRY. —The doctrine of a vendor's lien for the purchase-money prevails in upwards of half in number of the States, and in the other States the doctrine has either been rejected from the beginning, or, having prevailed at one time, has since been expelled by statute, although, it may be that in a few states the question of its existence has not been definitely decided. In the courts of the United States the doctrine has never been affirmed, except where established by the local law of the different states. The doctrine even in those States that have adopted it, has frequently been criticised and deplored as inconsistent with the general policy prevailing in this country of making all matters of title depend upon record evidence.

The doctrine is no more satisfactory now than it was in Lord Eldon's time; in fact it is much less so. From the nature of the equity, there could be but few fixed rules regarding it; but it will be observed in following the American decisions, which are numerous, that there is hardly a rule upon the subject that has not been somewhat denied; that hardly any two States can be found in which the courts agree upon all the important points of the doctrine; and that the cases are not rare in which the decisions in the same States are irreconcilable. The remark of Lord Mansfield, that "the more we read, the more we shall be confounded," is not without its application here.

The inquiry in every case is, whether there are *other equities superior to this lien, or whether it has been waived by any act of the party claiming it*. "Its existence," said Mr. Justice Potter, "depends upon and is controlled by no well-settled rules, but, on the contrary, the existence of the lien is generally made to depend upon the peculiar state of facts and circumstances surrounding the particular case; that is, *whether or not a case of natural equity is established, and, if so, whether it is not made to yield to higher or superior equities in some other person*; whether the party is not to be regarded as having waived it, or as having intended to waive or postpone it to another equity; or *whether by the acts or omissions to act, or by the neglect of the party claiming such lien to enforce it within a reasonable time*, the right is not lost as being the superior claim. These considerations control and vary the result as equity demands."

Jones on Liens, 2nd Ed. Vol. 2, Sec. 1063, p. 3.

"EFFECTS OF FRAUD. The equity acquired by a party who has been misled is superior to the interest in the same subject matter of the one who willfully procured or suffered him to be thus misled. The following example illustrates the operation of this rule, and the principal underlying it may be

generalized and applied to all analogous cases. A, being about to part with value to B upon the security of B's estate, informs C of his intention, and asks C whether he has any encumbrance on the estate; C denies that he has any, and A, relying upon his denial, parts with money or other value to B; in fact, C had at the time a mortgage or other incumbrance upon the estate; this mortgage or lien, although prior in time, would, by reason of C's fraud be postponed to the subsequent interest acquired by A. The basis of this rule is the conduct which equity regards as constituting fraud, either an actual intention to mislead, or that gross negligence which produces all the effects and merits all the blame of intentional deception. *It is not, however, necessary that the party having an interest or title, under such circumstance, when applied to, should use positive misrepresentations or expressly deny the existence of his right; it is sufficient if he refrains from disclosing his claim, and suffer a third person to deal with the property as his own, or to acquire an interest in or lien upon it; he will not be permitted to set up or enforce his interest in preference to that obtained by the person whom he has suffered to be misled by his silence."*

Pomeroy's Equity Jur. 3rd. ^{Ed.} Vol. 2, Sec. 686 p. 1194. [^]

"EFFECT OF FRAUD OR NEGLIGENCE UPON PRIORITIES. A priority which would otherwise have existed may also be disturbed and defeated by fraud or negligence in obtaining the interest *or in failing to secure it properly.* It is therefore a settled doctrine, that among successive equities otherwise equal, and also between a legal title or superior equitable interest earlier in time and subsequent equity, *the holder of the interest which is prior in time and would be prior in right may lose his precedence, and be postponed to the subsequent one by his own fraud or negligence, or that of his agent.* The same rule applies to the holder of

a subsequent legal estate who would otherwise have the precedence over a prior equitable interest; he may be postponed by reason of his neglect or fraud. While the general rule has been fully adopted by the American Courts, the cases involved it are much less frequent in this country than in England, *because almost every kind of interest in land is within the operation of the recording acts, and may be protected by a record.* Most instances of laches, therefore, coming before our courts have arisen from a neglect to record an instrument, or to comply with the provisions of some statute analogous to that of recording. The effects of negligence and want of diligence in postponing or even defeating the rights of an assignee or a thing in action, earlier in point of time, have already been described. One instance which may be regarded as an example of fraud, although the actual fraudulent intent is essential, is, where a prior encumbrancer, upon inquiry being made by a person interested, denies the existence of his lien, or where the owner of the legal estate denies his title under like circumstance, *or even keep silent and does not announce his title to an innocent person who is making expenditures, or advancing money upon the supposed security of the property."*

Pomeroy's Equity Jur. 3rd. Ed. Vol. 2, Sec. 731, p. 1293.

The Supreme Court of the United States, in 1822, speaking through Chief Justice Marshall, took occasion to place its stamp of disapproval on vendor's liens.

"To the world the vendee appears to hold the estate divested of any trust whatever: the credit is given to him in the confidence that the property is his own in equity, as well as at law. *A vendor relying upon his lien, ought to reduce it to a mort-*

gage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a court of chancery to the *exclusion of bona fide creditors.*"

"The lien of the vendor, if in the nature of a trust, *is a secret trust*; and, although to be preferred to any other subsequent equal equity unconnected with a legal advantage, or equitable advantage, which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity connected with such advantage."

Bayley v. Greenleaf, 7 Wheat. 46; 5 L. Ed. 393.

In Tennessee, in 1871, we find a decision, following Bayley v. Greenleaf, *supra*, where a vendor's lien is given by statute. Vide Code of Tennessee, §§ 3563, 3564.

"The equitable lien of the vendor of land, for the unpaid purchase-money, *is subordinate to a specific lien acquired by a creditor of the vendee, whether with or without notice, before proceedings are instituted to enforce such equitable liens.*"

Fain v. Inman, 19 Am. Rep. 577, Extra Annoted.

Under the present Bankruptcy Act, of 1898, certain decisions were rendered by the courts, which worked a great hardship on *unsecured creditors*.

Butler v. Baudouine, 82 N. Y. Supp. 773, affirmed 69 N. E. 1121, in 1903.

York Mfg. Co., v, Cassell, 201 U. S. 344, 50 L. Ed. 782, decided in 1906.

When courts have placed a certain construction upon a statute and the law making body decides that the application of the statute, as construed by the courts, has miscarried or given rise to vicious practices in connection with its subject matter and the law making body wishes to change the effect of the statute, as construed by the courts, and their intention is clearly expressed in the Committee reports and debates, this court can draw no other conclusion than that it is its duty to interpret an amendment to such statute in the light of the expressed intention of the law making body.

This court may say, is it your intention that the court shall be guided by congressional intention or presumed congressional intention as expressed in committee reports, regardless of the wording or phraseology of the act? No, certainly not, but we do contend that when a law is so framed as to yield to a construction which will carry out the intention of congress, as expressed and adopted in its committees' reports, then it is the duty of the court to so interpret the amendment as to give expression and effect to the intention of congress so expressed and approved in said reports.

This is the recognized economic theory upon

which the legislative and judicial functions of this government are co-ordinated.

It is doubtless natural for the judicial body to usurp the functions of the legislative department, and this usurpation has given rise to the present criticism by the people, of whom both departments are the creatures.

Congress in contemplation of the amendment to 47 a (2) had in mind certain abuses which had grown out of the construction placed upon the above section by the courts as evidenced by *York Mfg. Co., v. Cassell*, *supra*.

Both this court and appellant are familiar with the holdings of the courts of California and various other states, in their recent decisions upholding the equitable theory of the vendor's lien, but this court is also cognizant of the fact that the state courts in all of these cases were interpreting the will of their legislators as expressed in vendor lien statutes; they were not called to pass upon the effects of the United States Bankruptcy Act, as amended, on said statutes; this court is now presented with the question of interpreting this amendment in order to give uniform effect to the expressed intention of the Congress of the United States, which act, as amended, was drafted to counteract the vicious effect of the various state statutes

in their application to the Bankruptcy Act and interstate transactions.

The National Bankruptcy Act is in direct controvention of the common law vendor lein rights and other statutory rights, and could not have been enacted or enforced except by virtue of Art. 1. § 8, Clause 4 of the Constitution of the United States.

Congress determined to cure the glaring defects in the Bankruptcy Act and in 1910 enacted the following amendment to Section 47:

“And such trustee, as to all property in custody or coming into custody of the bankruptcy court, shall be deemed vested with all *rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon*; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.”

The Circuit Court of Appeals, for the Second Circuit, In re Morris, 204 F. 770, in 1913, discusses the effects of Butler v. Baudouine, supra, on the amendment to Section 47, supra, and the immateriality, of the fact that the amendment was not made a part of Section 70.

This Court, in May 1913, held, referring to Section 47, supra;

“It is the purpose of this amendment to vest in the trustee for the interest of all creditors the potential rights of creditors possessing or holding liens upon the property coming into his custody by legal or equitable proceedings. The trustee no longer stands in the shoes merely of the bankrupt, with the limited rights of the bankrupt to attack unrecorded liens which may be valid and unimpeachable by such bankrupt; but the amendment by operation of law vests in him a lien equivalent to such as would be acquired by legal or equitable proceedings upon the property coming into his custody by virtue of the bankruptcy proceedings. “The class of cases, unprovided for by the original act, and intended to be reached by the amendment,” says Mr. Collier in his work on Bankruptcy (9th Ed.) p. 659, “was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors potential with such liens.” “This provision of the Bankruptcy Act,” says Winter, Judge, in *re Hartdagen* (D. C.) 189 Fed. 546, 549 26 Am. Bankr. Rep. 532, 535, “puts the trustee, in so far as the assets of the estate are concerned, in the position of a lien creditor,” distinguishing the case of *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and others of its character, which it is thought inspired the amendment.”

In re Raymond Box Co., 205 F. 618-622.

The Supreme Court of Idaho has had occasion to comment on Section 47, as amended, *supra*:

“The effect of the amendment of 1910 to Section 47 of the Bankruptcy Act is that the trustee may now challenge any security or conveyance that a lien or judgement creditor might have challenged had the bankruptcy not intervened.”

Corey v. Blackwell Lumber Company, 135 P. 742.

It will be observed that secret liens have been in

bad repute in the United States Supreme Court since 1822; that Tennessee, in 1871, followed *Bayley v. Greenleaf*, supra; that Congress in 1910 decided to take away the advantage given by the Supreme Court of the United States, in *York Mfg. Co. v. Cassell*, supra, to holders of unrecorded liens.

In *Kerr v. Finch*, 135 P. 1165, our court said:

"Precedent is and should be strongly persuasive with the courts, but never controlling, and, when the reason for it ceases to exist, or it fails to accomplish justice, it should be disregarded."

"It is not a lien until a bill has been filed to assert it. Before this is done, it is a mere equity or capacity to acquire a lien and to have a satisfaction of it.

If this floating equity, misnamed in judicial parlance the 'vendor's lien', be not quite a myth, but a mere capacity in the vendor to acquire a lien if he chooses, then this same capacity belongs to others who, as creditors, have rights just as meritorious as his. And we hold that the simple knowledge on the part of a creditor that the vendor, sleeping from year to year upon his rights, may if he chooses, acquire a lien, as the creditor himself is about to do, cannot, even in the forum of conscience, impair the value acquired by the creditor. In such case there is no mala fides.

The vendor who sells and conveys real estate, without reserving a specific lien, may enforce his equity, as against his vendee and mere volunteers, at any time before conveyance; *but, as against purchasers from and creditors of the vendee, he comes too late, if he has delayed filing his bill and fixing a charge on the property until after they have acquired rights, and evidenced them through the*

public records of the state, as the law provides."

Robinson v. Owens et. al, 52 S. W. 870 (Tenn.)
1899.

The Circuit Court of Appeals, for the 6th Circuit, referring to vendor liens, termed them as:

"The most fragile of all liens known to a court of equity, one most easily displaced and never existing except by the clearest implication of the intention of the party that it should stand as a security for the purchase money yet unpaid."

Blake v. Pine Mountain Iron & Coal Co., 76 F.
624-642, 6th Circuit.

"There should be uniformity throughout the country, under which there will be an equitable distribution of the bankrupts property whereby he may not be able to give preferences to relatives and friends, so that the nearby creditor cannot be given a preference over the creditor far away, who has possibly furnished nine-tenths of the capital upon which the debtor has been working. He should be put in the same situation as those who are on the ground, so he can receive equal privileges." Remarks of Mr. Tirrell, Chairman of the Judiciary Committee in the House of Representatives, in his remarks in support of the amendments of 1910. Congressional Record Vol. 45, Part 3, p. 2265.

To prove to this tribunal that our contention against the vicious unrecorded vendor lien claimed against this estate to the extent of \$5,000 is correct, the following is the Committee Report from the House, adopted by the Senate in toto, bearing upon the above section 47 which *we claim should forever destroy the most obnoxious and detestable lien known to the credit world.*

"One of the most important decisions under the

present law is *York Manufacturing Company v. Cas-sell* (201 U. S. 344), wherein it was held that property conveyed by an unrecorded instrument, which would have been void in the state courts had the property been taken by an assignee or receiver, or levied upon by attachment or execution, was not void where possession was taken by a receiver or trustee in bankruptcy, the Supreme Court holding that the trustee stood precisely in the bankrupt's shoes with regard to the unrecorded instrument, even though in the state courts had the seizure been made by the assignee in insolvency, or receiver, or by the sheriff under execution or attachment, the unrecorded lien would have been void as against creditors. By this ruling the trustee in bankruptcy is held to be vested solely with the bankrupt's own title, except as to property fraudulently transferred, and as to property which (within four months before the bankruptcy) has been seized by a creditor by legal process, or voluntarily transferred to him by way of preference.

The trustee, under the present law, does not (except as to fraudulently transferred property) take the rights that a creditor under state law might have acquired, but only such as some creditor has actually acquired by levy of process, and then only in the event such levy has occurred within four months before the bankruptcy and the lien of the levy (otherwise void under section 67 f) been preserved for the benefit of the trustee by order of the court, and then it is void only to the extent of the execution or attachment levied. *In this way a distinct advantage is given in bankruptcy to the holder of unrecorded liens.* The creditors' hands meanwhile are tied from making any levy, because the separate rights of the creditors have become vested in the trustee for all; besides which, as to property already in the custody of the bankruptcy court, of course individual creditors would be in contempt of court should they levy thereon. *Thus the evil of secret liens has continued. It is this evil and injustice worked upon creditors who rely on the debtors' ap-*

parent ownership against which the bankruptcy law has set its face.

The proposed amendment, whilst covering the defect named, at the same time carefully guards the rights of all parties. It is evident that in the proposed amendment attempt is made to give effect to two ideas quite distinct: First, that as to the property in the custody of the bankrupt court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under the state law; and, second, that as to property not in the custody of the bankruptcy court the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed precisely as an individual creditor might have done to subject assets. In this way, in effect, proceedings in bankruptcy will give to the creditors all the rights that creditors under the state law might have had had there been no bankruptcy and from which they are debarred by the bankruptcy—certainly a very desirable and eminently fair position to be granted to the trustee."

Some of the ablest lawyers in America assisted in drafting, and approved, the amendment to section 47, and, being experienced and practical men, certainly had in mind the rule laid down in *Pomeroy*, § 731, *supra*, in order to protect creditors who had advanced money on the record ownership of property; it was also intended that its operation should be uniform throughout the United States, appreciating that a secret lien is a dangerous one and not entitled to favor, especially now that every facility is offered for the recording and preservation of liens, or of giv-

ing notice to the world of their existence.

Under the state statute a mortgage, real or personal, is valid both as to past and present consideration. The Bankruptcy Act comes along and decrees that it is not good, under the statute, except as to the present consideration, thereby repealing in part the state statute during bankruptcy proceedings.

There are many other instances, too numerous, to mention, where state statutes have become inoperative after bankruptcy.

Practically all of the amendments, of 1910, to the Bankruptcy Act, show a studied intention by Congress to deprive all creditors of the statutory advantages which are used to secure unjust and inequitable legal advantages over other creditors, which advantages are subversive of the plain purpose of the law. These amendments were made, as the committee report recites, for the purpose of curing these abuses which had crept into the Bankruptcy Jurisprudence.

SIX HUNDRED SIXTY acres of the bankrupt's land is now in litigation, under the vendor lien claims. The total amount claimed by the lien claimants is \$10,857.08 and the appraised value of the lands covered thereby is \$4300.00.

As between M. K. Wall, and his vendors lien, and the trustee, and his Federal Statutory lien, the

question resolves itself as to whose lien is entitled, under all the circumstances, to priority.

This leads us to the discussion of a maxim of equity. "Equity aids the vigilant, not those who slumber on their rights." The creditors were vigilant by having the Lane Lumber Company adjudged an involuntary bankrupt before M. K. Wall attempted to assert his vendor's lien. See Pomeroy §731, *supra*.

The trustee takes a stand against this kind of lien because the bankruptcy law was intended for honest, unfortunate business people. If this court sustains the vendors lien it will start an avalanche of fraud. The credit of honest owners of land will be greatly impaired. There will be no check on a person buying 10,000 acres of land worth \$300,000 for one-tenth down, being \$30,000, giving promissory notes for nine-tenths of the purchase price, being \$270,000 thereafter borrowing \$75,000 on unsecured commercial paper and go into bankruptcy. The person who furnishes the \$75,000 will lose all his collateral, by vendor liens, and the shrewd schemer will make a "clean up" of \$45,000 net.

In order to put a uniform construction in all the states on the effect of the Section 47, as amended, it is necessary for this court to hold that unasserted and unrecorded vendor liens, no matter in what state

they spring up after bankruptcy, are null and void as against the trustee under the National Bankruptcy Act.

We submit that in fairness to the credit world, and in order to make the operation of the bankruptcy law uniform throughout these United States, the vendor's lien claim of M. K. Wall, in the sum of \$5,000, should be disallowed and the judgement of the lower court reversed.

Attention is respectfully called to General Orders in Bankruptcy XXXVI-3.

E. N. LA VEINE,

Attorney for Trustee,

Address: Coeur d'Alene, Idaho.

JOHN H. WOURMS,

Amicus Curiae,

Address: Wallace, Idaho.

A copy of the foregoing brief received this
.....day of Feb., 1914, at Coeur d'Alene,
Idaho.

Attorney for Appellee.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAMUEL L. BOYD, as Trustee in Bankruptcy of
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a Corporation, Bankrupt,
Appellant,

v.

M. K. WALL, Appellee.

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Upon appeal from the United States District Court
for the District of Idaho, Northern Division.

BRIEF OF APPELLEE, M. K. WALL.

FRANK LANGLEY,
Attorney for Appellee.
Coeur d'Alene, Idaho,

Filed this.....day of February, 1914.

Clerk.

FILED

FEB 9 - 1914

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STATEMENT OF THE CASE.

The Record herein shows the following facts:

That on March 6, 1911, the appellee, M. K. Wall,
sold and conveyed to the Lane Lumber Company,
bankrupt, the E $\frac{1}{2}$ of the NW $\frac{1}{4}$ of section 35, and
the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of section 26, Twp. 49 North,
Range 2, W. B. M., Kootenai County, Idaho, for the
agreed purchase price of \$5000.00, no part of which
has ever been paid, and the payment of which is un-
secured otherwise than by the personal obligation of
the buyer (Record pp. 32 and 33); on June 20, 1911, a
petition was filed by various creditors to have the

said Lane Lumber Company adjudged a bankrupt (Record p. 34); on July 29, 1911, said Lane Lumber Company was adjudged a bankrupt (Record p. 33); on September 22, 1911, Samuel L. Boyd qualified as trustee of the bankrupt, and has continued to act, and is now acting, as such trustee (Record p. 33), and, as such trustee, he had no notice of said vendor's lien until the same was filed with the referee, Lawrence L. Lewis (Record p. 34); that M. K. Wall was Secretary of the bankrupt, with full knowledge of its embarrassed financial condition at the time of said transfer, which said purchase and transfer was not authorized or ratified by the Board of directors of said Lane Lumber Company (Record p. 35); that M. K. Wall, as an officer of the bankrupt, permitted said lands to remain on the records unincumbered (Record p. 35); on June 19, 1912, M. K. Wall filed his proof of secured debt claiming \$5000.00 as a vendor's lien against the above described property of the bankrupt (Record p. 33); the appraised value of the land on which the vendor's lien is claimed, placed thereon by the appraisers, is \$919.00 (Record p. 34); on August 10, 1912, the trustee filed his objections to said proof of secured debt (Record p. 33); on July 31, 1913, the referee overruled said objections and allowed the proof of secured debt as a vendor's lien in the sum of \$5000.00 (Record p. 19); on September 3, 1913, the

trustee filed his petition for review (Record p. 15); on November 19, 1913, the referee filed his report thereon with the Clerk of the U. S. District Court (Record p. 22); on December 2, 1913, the Hon. Frank S. Dietrich, U. S. District Judge, rendered his Memorandum Decision affirming the referee in establishing said vendor's lien (Record p. 25); on December 13, 1913, said District Judge caused his Findings of Fact and Conclusions of Law to be filed (Record p. 32); and, on December 23, 1913, said District Judge caused his Judgment thereon to be filed (Record p. 36).

The foregoing Statement of the Case is based upon the Findings of Fact herein (Record pp. 32 to 36).

From said Memorandum Decision, and said Judgment, the trustee has appealed to this Honorable Court.

ARGUMENT.

The facts in this case are not in dispute, for they are contained in the Findings of Fact of the District Judge (Record pp. 32 to 36), and the only questions involved are questions of law.

The Appellee takes exception to the statement, found on page 6 of Appellant's Brief, to the effect that the trustee paid taxes on the lands involved, for the reason that the same is not included in the assignments of error (Record pp. 39 and 40), and is not shown

by said Findings of Fact (Record p. 32), nor by any other part of the Record.

The Appellee deems it advisable to explain to the Court the grounds upon which the vendor's lien claim is based, and to then discuss the effects of the bankruptcy proceedings, particularly the effects of the trustee's rights and powers under Section 47a of the Bankruptcy Act of 1898, as amended in 1910, upon the lien claim.

It must be held that, under the facts as found and conceded in this case, the right to a lien for the unpaid purchase price existed at the time of the commencement of the proceedings in bankruptcy. Indeed, the trustee has conceded such to be the fact and the law: See Memorandum Decision of Judge Dietrich (Record p. 26). Such a lien is established by Section 3441, Idaho Revised Codes, reading:

"One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

The case of Bayley vs. Greenleaf, 7 Wheat. 46; 5 L. Ed. 393, cited in Appellant's Brief at page 11 in support of the statement that vendor's liens are looked upon with disfavor in the United States, is not applicable to the case at bar, because Section 3441,

Idaho Revised Codes, *supra*, settles the question in Idaho. The *Bayley vs. Greenleaf* decision is based upon the theory that both parties to the litigation possess equal equities and that neither has a legal advantage; while in the case at bar, the vendor's lien claimant has a greater equity as well as a legal advantage under said section 3441 of the State Statutes. Neither does the decision in that case correctly state the law as to vendor's liens as later established by the Courts of the United States. Courts of Equity look upon vendor's liens as creatures of the highest equity.

Baum. v. Grigsby, 21 Calif. 172, 176.

Redfield v. Woodfolk, 63 U. S. 22 How. 318; 16 L. Ed. 370.

Chilton v. Lyons, 67 U. S. 458; 17 L. Ed. 304.

Slide etc. Gold Mines v. Seymour, 153 U. S. 509; 38 L. Ed. 802.

That portion of the trustee's Brief dealing with the question of the merits of vendor's liens in general is neither material to nor pertinent to the issues involved in this controversy, for the reason that the Legislature of the State of Idaho, in its wisdom, has seen fit to establish the right to a vendor's lien under the facts existing in this case as shown by the above quoted section of the State Statutes; and the question of whether such a law is good or wise is imma-

terial to this controversy. If there is merit in such an argument, by counsel for the trustee, it should be addressed to the State Legislature, or to Congress, not to the courts whose province it is to enforce the law as it is written.

In passing upon lien claim based upon State laws, bankruptcy courts follow the law of the State where the land in controversy is situated. Counsel for the trustee has not cited, and can not cite, a case where a Federal Bankruptcy Court has refused to recognize and uphold a State law affecting title to real property in a controversy involving a lien or mortgage claim against such property.

Chilton v. Lyons, 67 U. S. 458; 17 L. Ed. 304, *supra*.

Slide etc. Gold Mines v. Seymour, 153 U. S. 509; 38 L. Ed. 802, *supra*.

Sturdevant Bank v. Schade, 195 Fed. 183.

Bankruptcy Act of 1898, as amended, Sec. 67 (d).
Section 67 (d) of the Bankruptcy Act reads:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon the Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act."

It is not contended by the trustee that this lien was not given and accepted for a present, valuable consideration; for the claimant has parted with the ownership of the lands involved and has never been paid one cent on the purchase price, though the same is long past due. Neither is it contended by the trustee that the laws of Idaho require vendor's liens to be recorded; and it is neither so required nor provided for. Nor is there anything in the Record nor in the Findings of Fact of the District Judge (Record pp. 32 to 36), nor in the trustee's assignments of error (Record pp. 39 & 40), that raises the question of bad faith or fraud on the part of anyone; unless, the trustee is acting in bad faith in attempting to defeat the lien claim upon the ground that the purchase of the lands involved was not authorized by the Board of Directors of the bankrupt company. But such a contention can not be sustained. The Lane Lumber Company obtained title, and possession of the lands, and still holds the same, upon its promise to pay the price; and it can not now be heard to say that it will receive and hold the benefits of its possibly unauthorized contracts, and refuse to pay the consideration agreed upon therefor. M. K. Wall has the same right to his vendor's lien that he has to the allowance of his claim as an unsecured debt.

Idaho 361; 78 Pac. 1080.

Chilton v. Lyons, 67 U. S. 458; 17 L. Ed. 304,
supra.

Slide etc. Gold Mines v. Seymour, 153 U. S. 509;
38 L. Ed. 802, 806, supra.

Prior to the amendment to the Bankruptcy Act in 1910, the trustee had not authority to attack claims based upon unrecorded liens and mortgages even where the State law required such to be recorded; nor did he then possess certain other powers now his under the Act, as amended.

Remington on Bankruptcy, Secs. 1207½ to 1210.

In re Economical Printing Co., 110 Fed. 514.

York Mfg. Co. v. Cassell, 201 U. S. 344; 50 L.
Ed. 782.

But, Section 47a of the Act, as amended in 1910, confers upon trustees, "*as to all property in the custody or coming into the custody of the bankruptcy court, all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon.*" The purpose of such amendment relates not to the validity of liens established and recognized under State laws; but only to the trustee's right to question claims that are defective or invalid under such laws. Section 70 of the Act fixes the trustee's title.

Loveland on Bankruptcy (4th Ed.), section 372.

In re Morris 204 Fed. 770.

In re Raymond Box Company, 205 Fed. 618.

Big Four Implement Co. v. Wright, 207 Fed. 535.

In re Stern, 208 Fed. 488.

Corey v. Blackwell Lbr. Co (Idaho), 135 Pac. 742.

Memorandum Decision of Judge Dietrich (Record pp. 26 to 32).

The Committee Report of the House of Representatives, bearing upon the object of the amendment of the above Section 47, and quoted in Appellant's Brief at pages 18 and 19, shows the purpose of Congress to have been to give to the trustee the right and power to attack lien claims because of some inherent defect therein, or because of failure to place the same of record where the State law required such to be done; and, further, shows that the intention of Congress was to recognize the laws of the State where the property involved is situated.

The cases of *In re Morris*, 204 Fed. 770; *In re Raymond Box Co.*, 205 Fed. 618; and *Corey v. Blackwell Lumber Co. (Idaho)*, 135 Pac. 742, *supra*, cited in appellant's Brief at pages 14 and 15, exactly sustain our view of the purpose of Congress in amending Section 47 of the Bankruptcy Act in 1910. In the case of *In re Morris*, 204 Fed. 770, cited in Appellant's Brief at page 11, where creditors objected to the discharge of the trustee for the reason that, un-

der the decision in *Butler v. Badouine*, 82 N. Y. Supp. 773; 69 N. E. 1121, the trustee after the bankrupt's discharge would not have the right or power to reach the income from a certain trust fund belonging to the bankrupt, the Court remarked that such an objection would have been good prior to the amendment of 1910; but that such objection is no longer good, the Court saying:

"It is not surprising, therefore, to find that subsequent to the *Badouine* decision Congress in 1910 amended the Bankruptcy Act, Section 47 (a) 2 * * * *. Since the right to take proceedings to recover surplus income such as there is alleged to be here, in the interests of all creditors, is now vested in the trustee, and that right will be unaffected by a discharge, there is no longer any reason for postponing an application for discharge."

In the case of *In re Raymond Box Company*, 205 Fed. 618, (C. C. A. 9th Cir.), cited in Appellant's Brief at page 15, where a Chattel Mortgage, not recorded as required by the State laws of Washington, was filed with the trustee as a secured claim, the Court held that under the amendment of 1910 the trustee might attack the mortgage claim, because of the failure to record the same as required by the recording act of the State. From the decision in said case it will be observed that the laws of Washington provide:

"A mortgage of personal property is void as

against creditors of the mortgagor or subsequent purchaser, and incumbrances of the property for value and in good faith, unless ***** it is recorded in the same manner as is required by law in conveyance of real property."

The Chattel Mortgage Lien was, therefore, denied, because the State law, quoted supra, made the mortgage lien void as against creditors of the bankrupt; and, because Section 47a of the Bankruptcy Act, as amended in 1910, gives the trustee the rights, remedies and powers of a judgment creditor. In Idaho, there is no law providing that a vendor's lien is void as against creditors of the purchaser; neither is there any law providing for or making it possible to record such a lien. On the contrary, it is expressly provided that the vendor's lien is valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value.

Section 3443, Idaho Revised Codes, reads:

"The liens of vendors and purchasers of real property are valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value."

The foregoing section of the Idaho Codes establishes, conclusively, the sole manner by which the vendor's lien is lost in Idaho. At most, the trustee has no greater rights than has a judgment creditor.

But, such a creditor is not "a purchaser or incumbrancer and for value."

Dawson v. McCarty, 57 Pac. 816.

Heister's Lessee (Pa.) 4 Am. Dec. 417, at page 422.)

Pacific State Bank v. Coats, 205 Fed. 618, 625 (C. C. A., 9th Circuit).

Pomeroy's Equity Jurisdiction, section 721.

In the case of Corey v. Blackwell Lumber Co. (Idaho), 135 Pac. 742, cited in Appellant's Brief at page 15, the supreme court of Idaho, construing the amendment of 1910 to section 47a of the Bankruptcy Act, cited Loveland on Bankruptcy (4th Ed.), section 372, and quoted with approval as follows:

"The effect of said amendment is that the trustee may now challenge any security or conveyance that a lien or judgment creditor might have challenged had the bankruptcy not intervened."

The cases of Kerr v. Finch. 135 Pac. 1165, cited in Appellant's Brief at page 16, and Blake v. Pine Mountain Iron & Coal Co., 76 Fed. 624, cited in Appellant's Brief at page 17, do not involve facts or issues even remotely related to those found in the case now under consideration; and, consequently, they have no bearing upon the controversy now before the court.

On the question of laches, raised by the trustee's

first assignment of error (Record pp. 39 and 40), I will call attention to the fact that the land in controversy was sold to the Lane Lumber Company on March 6, 1911 (Record p. 32); that the petition in bankruptcy was filed against said company on June 20, 1911 (Record p. 34); that the company was adjudged a bankrupt on July 29, 1911 (Record p. 33); and that the vendor's lien claim of M. K. Wall was filed on June 19, 1912 (Record p. 33). There was no occasion calling for the filing of the lien claim until the company was adjudged a bankrupt and the trustee qualified. Indeed it is not likely that the claimant ever supposed that he would encounter difficulty in collecting the debt. Nor is it likely that he knew of his right to a vendor's lien for the unpaid purchase price of the lands sold. The State Legislature undoubtedly enacted the vendor's lien Statutes, quoted above, for the very purpose of protecting just such creditor's as the claimant here. Even though it be conceded, for the sake of argument, that section 3443, Idaho Revised Codes, *supra*, did not establish and limit exclusively, the sole manner in which the vendor's lien can be lost, the defense of laches could not be maintained in this case, because no delay in asserting the lien occurred; and, because, as said by this Court in the case of *London & San Francisco Bank v. Dexter Horton & Company*, 126 Fed. 593 (C. C. A., 9th Circuit),

supported by authorities therein cited at page 601:

“One principle pervades all cases involving the defense of laches, however, and that is, that not only must there be a seemingly unnecessary delay on the the part of the plaintiff in bringing or prosecuting his action, but that by reason of some change in the condition or relations of the property or parties occurring during the period of delay, it would be inequitable to permit the claim of plaintiff to be enforced.”

Felix v. Patrick, 145 U. S. 317; 36 L. Ed. 719.

Bartlett v. Ambrose, 78 Fed, 839.

Selna v. Selna (Calif.), 58 Pac. 16.

Obert v. Obert, 12 N. J. Eq. 423.

And, wherein has any delay in asserting the vendor's lien caused prejudice to the trustee or to the bankrupt estate? Or, what change in the condition or relations of the property or parties has occurred which would not make it inequitable to permit the lien to be enforced?

In view of the vendor's lien Statutes of Idaho, supra, and of Section 67 (d) of the Bankruptcy Act, and of the equitable nature of proceedings in bankruptcy and of the relief asked, I respectfully submit that the Memorandum Decision and the Judgment of the Honorable District Judge, and each of them, should be sustained and affirmed.

Respectfully Submitted,
FRANK LANGLEY,
Attorney for Appellee,
Address: Coeur d'Alene Idaho.

Service of the foregoing Brief of M. K. Wall, Appellee, is hereby accepted, by the receipt of a copy thereof, this third day of February,
A. D., 1914.

E. N. La Vigne

Attorney for Trustee.

copy.

United States
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Reply Brief of Appellant, Samuel L. Boyd, Trustee.

E. N. LA VEINE,
Attorney for Appellant,
Coeur d'Alene, Idaho,
JOHN H. WOURMS,
Amicus Curiae,
Wallace, Idaho.

Filed this _____ day of February, 1914.

FILED

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Clerk.

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Bankrupt.

Upon appeal from the United States District Court
for the District of Idaho, Northern Division.

It was not the intention of the appellant to ask leave of this Court to file a reply brief but owing to one phase of the litigation developed by the appellee, we beg leave to submit the following, bearing upon the "incumbrancer in good faith and for value" portion of Section 3443 of the statute under consideration.

In the Idaho Revised Statutes of 1887 the vendor lien sections herein referred to are §3440 and 3442.

In the Idaho Revised Codes of 1898 we find the identical sections being §3441 and 3443.

The Bankruptcy Act was enacted in 1898 after the enactment of the said vendor lien sections, which proves that the Legislature of Idaho could not have contemplated the passage or operation thereon of any Federal Bankruptcy statute.

The Supreme Court of Idaho has never passed on its vendor lien sections nor can we have any good reason for believing that, when called upon to do so in a case where the facts are similar to those herein, the Supreme Court will sustain a vendor's unasserted equity against the asserted rights of the trustee under the Bankruptcy Act.

There can be no dispute that, as a representative of the creditors, the trustee on his appointment and qualification became vested with title to the bankrupt's property in good faith, as said in section 47a, "with all the rights, remedied, and powers of a *creditor, holding a lien by a legal or equitable proceedings thereon.*"

The 2nd section of the statute relied upon by appellee provides that the vendor liens are valid against everyone claiming under the debtor, "except a purchaser or incumbrancer in good faith and for value."

The lien acquired under the Bankruptcy Act by the Trustee, for the creditors, makes him an "incumbrancer in good faith," and the credit extended by the various creditors of the bankrupt is the "value."

"An incumbrance is defined as a burden, an obstruction, impediment."

Anderson's Dictionary of Law, p. 533.

"An attachment levied upon the land is an incumbrance."

Kelsey v. Remer, 43 Conn. 129, 29 Am. Rep. 638-639-640 (Conn).

"The lien of an attaching creditor is an incumbrance, equally with a mortgage."

Spangler v. West 43 P. 905-907. (Colo.).

"A judgment is an incumbrance, and the holder thereof is an incumbrancer."

Devoe v. Runkle 74 P. 836-837-838. (Wash.)

An attachment is an incumbrance "and shall take precedence of an unrecorded title or interest of which the attaching creditor had no notice before attachment."

Teller v. Hill 72 P. 811-813. (Colo.).

In view of the foregoing principals, and the decisions in support of our contention that the trustee has a right to contest the vendor's lien as a purchaser or incumbrancer in good faith and for value, it follows that the rules of equity, applying to liens, cited in our opening brief, make it quite evident that the title to the land acquired by the trustee causes a postponement of the vendor's lien right which thereby loses its precedence and is postponed to the sub-

sequent equity and title of the trustee on account of the negligence and laches of the claimant and the operation of the Bankruptcy Act as amended.

Under Section 3149, Idaho Revised Codes, the lien claimant might have protected his vendor lien by filing notice thereof with the County Recorder of the county in which the land is situated, as materialmen, laborers and other lien claimants are required to do. The last mentioned class of lien claimants must file their claims for record within 60 days after furnishing the material or performing the labor or they lose their statutory lien. This court should not say that a vendor's lien claimant, a freeholder, a man necessarily more experienced in the business world than a laborer, shall be given a preference and an advantage over the sinew of our nation.

Respectfully submitted.

on construction
urgess v.
eligman.

07 U.S. 20-33.

E. N. LA VEINE,
Attorney for Appellant
Address: Coeur d'Alene, Idaho.

JOHN H. WOURMS,
Amicus Curiae,
Address: Wallace, Idaho.

A copy of the foregoing brief received this
day of Feb. 1914, at Coeur d'Alene Idaho.

Attorney for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
the LANE LUMBER COMPANY, LIM-
ITED, a Corporation, Bankrupt,

Appellant,

vs.

MARY WALL,

Appellee.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation, Bankrupt.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Idaho, Northern Division.

FILED

JAN 17 1914

United States
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SAMUEL L. BOYD, as Trustee in Bankruptcy of
the LANE LUMBER COMPANY, LIM-
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In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation, Bankrupt.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Idaho, Northern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

E. N. LaVEINE, Attorney for Samuel L. Boyd,
Trustee of the Lane Lumber Company, Limited,
a Corporation, Involuntary Bankrupt.

Residence and P. O. Address: Coeur d'Alene,
Idaho.

FRANK LANGLEY, Attorney for Mary Wall,
Claimant.

Residence and P. O. Address: Coeur d'Alene,
Idaho.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

IN BANKRUPTCY—No. 449.

In the Matter of LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

Proof of Claim.

At Harrison, in the county of Kootenai, State of Idaho, on the 6th day of September, 1911, came Mary Wall, of Harrison, Kootenai County, State of Idaho, and made oath and says the Lane Lumber Company, Limited, a corporation, against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly indebted to said deponent in the sum of one thousand sixty-six and 25/100 (\$1,066.25) dollars, as is evidenced by a certain promissory note for the sum of \$750.00 dated at Lane, Idaho, December 2d,

1907, executed by said bankrupt, in favor of deponent, said note being hereto attached, made part hereof, filed herewith and marked exhibit "A"; and as evidenced by a certain check for the sum of eighty dollars, dated at Harrison, Idaho, March 19, 1910, executed by said bankrupt in favor of deponent, said check being hereto attached, made part hereof, filed herewith and marked exhibit "B"; that the consideration for said promissory note is as follows: That deponent sold to said bankrupt the following described property, and that said *promissory was* given in *payment part* of the purchase price thereof: The north one-half of the northeast quarter (NE. $\frac{1}{2}$ of NE. $\frac{1}{4}$) and north one-half of the northwest quarter (N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$) of section thirty-four (34), township forty-nine (49) north of range two (2) east, B. M.; that the consideration for said check is as follows: [1*]

EXHIBIT "A."

In payment for work, labor and services performed at Kootenai camp between the 15th day of November, 1909, and the 1st day of May, 1910, at the rate of \$40.00 per month less \$140.00 credit, as per itemized statement attached hereto and made a part hereof, and filed herewith, and that the M. A. Wall, payee in said check, and the Mary Wall, payee in said promissory note, is one and the same person, and is the person who makes this proof of claim; that no part of said debt has been paid, and that there are no setoffs or counterclaims to the same, and

*Page-number appearing at foot of page of original certified Record.

that the deponent has not nor has any person by her order or to her knowledge or belief for her use had or received any manner of security for said debt whatever, and that no judgment has been rendered thereon; and that no note has been given for the payment of said sum of \$80.00 evidenced by said check.

MARY WALL.

Subscribed and sworn to before me this 6th day of September, 1911.

[Seal]

M. A. KIGER,
Notary Public. [2]

Harrison, Idaho, Sept. 6, 1911.

Lane Lumber Company *Company*, Ltd.

To Mary Wall.

1909.

Nov. 1/2 mo.	For work, labor and services performed at Kootenai Camp at the agreed wages of \$40.00 per month clerking and keeping books....	\$ 20.00
--------------	---	----------

Dec. 1 mo.	“ “	40.00
------------	-------------	-------

1910.

Jan. 1 mo.	“ “	40.00
------------	-------------	-------

Feb. 1 mo.	“ “	40.00
------------	-------------	-------

Mar. 1 mo.	“ “	40.00
------------	-------------	-------

Apr. 1 mo.	“ “	40.00
------------	-------------	-------

\$220.00

Credit:

By check.....	140.00
---------------	--------

[3]

\$ 80.00

[Endorsed]: In Matter of Lane Lumber Co., Ltd., a Corporation, Bankrupt. Proof of Claim and Power of Attorney from Mary Wall. Amt. \$1066.25. Allowed. Filed this 7th day of Sept. 1911, at 10 o'clock A. M. L. L. Lewis, Referee. Filed Dec. 23, 1913. A. L. Richardson, Clerk. [4]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

IN BANKRUPTCY—No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

Amended Proof of Claim.

State of Idaho,
County of Kootenai,—ss.

At Harrison, in the county of Kootenai, State of Idaho, on the 10 day of June, 1912, came Mary Wall, of said city of Harrison, and made oath and says: That the Lane Lumber Company, Ltd., a corporation, against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly indebted to said deponent in the sum of one thousand twenty-three and 35/100 dollars (\$1,023.35), as is evidenced by a certain promissory note for \$750.00, with interest at the rate of 7% per annum from date until paid, dated at Lane, Idaho, December 2, 1907, executed by said bankrupt in favor of deponent, said note being attached to the original proof of claim

filed herein on the 7th day of September, 1911, marked exhibit "A"; and as evidenced by a certain check for the sum of eighty dollars (\$80.00), dated at Harrison, Idaho, March 19, 1910, executed by said bankrupt in favor of deponent, and being attached to said original proof of claim and marked exhibit "B"; that the consideration for said promissory note is as follows, to wit: That on or about the 2 day of December, 1907, deponent sold and delivered to said bankrupt the north half of the northeast quarter and the north half of the northwest quarter of section thirty-four in township forty-nine north, range two east of Boise Meridian, in Shoshone County, State of Idaho, and said note was executed and delivered by said bankrupt to deponent in payment of part of the price of [5] said premises which have never been transferred or conveyed by said bankrupt to any purchaser or incumbrancer in good faith and for value; and that said note is unpaid and unsecured otherwise than by the personal obligation of said bankrupt; and that under the laws of the State of Idaho deponent is entitled to a vendor's lien against said premises for the amount due upon said note, to wit: \$750.00 principal, and \$186.35 interest; that the consideration for said claim for said sum of \$80.00 evidenced by said check is as follows, to wit: That deponent was employed by said bankrupt between November 15, 1909, and May 1, 1910, as a bookkeeper and clerk, at Kootenai Camp, for the price of \$40.00 per month; that deponent under such contract performed such labor and received such pay therefor

as is shown by the itemized statement hereto attached and marked exhibit "B," the deponent under such employment earning the sum of \$220.00, and receiving pay thereon in the sum of \$140.00, leaving a balance due in the sum of \$80.00, which sum is evidenced by said check, which sum with interest amounting to \$7.00 deponent claims as an unsecured claim against said bankrupt. That deponent and M. A. Wall, payee in said check, are one and the same person.

That no part of said debts or either of them has been paid, and that there are no setoffs or counterclaims to the same, and the deponent has not nor has any person by his order or to his knowledge or belief for her use had or received any manner of security for said debts whatever; and that no judgment has been rendered thereon; and that no note otherwise than as hereinbefore mentioned has been given for said debts; that said exhibits marked "A" and "B," respectively, and attached to said Original Proof of Claim are hereby referred to and made a part of this Amended Proof of Claim.

Deponent prays the Court to allow and pay said sum of \$750.00 and \$186.35, respectively, due on said promissory note, as a preferred and secured claim, and that the same be declared [6] to be a lien against said premises, and that such premises be sold and the proceeds arising from the sale thereof be applied towards the payment of the amount so due upon said promissory note; and that said sum of \$87.00 be allowed and paid as an unsecured claim against said bankrupt estate.

MARY WALL.

Subscribed and sworn to before me this 10 day of
June, A. D. 1912.

[Seal]

FRANK LANGLEY,

Notary Public. [7]

**Exhibit "B" [Itemized Statement Rendered by
Lane Lumber Company to Mary Wall.**

Harrison, Idaho, September 6, 1911.

Lane Lumber Company, Ltd.

To Mary Wall.

1909.

Nov. 1/2 mo. For work, labor and services
performed at Kootenai
Camp at the agreed wages
of \$40.00 per month clerk-
ing and keeping books....\$ 20.00

Dec. 1 mo. Clerking and keeping books.. 40.00

1910.

Jan. 1 mo. " " 40.00

Feb. 1 mo. " " 40.00

Mar. 1 mo. " " 40.00

Apr. 1 mo. " " 40.00

\$220.00

Credit 140.00

By check.....\$ 80.00

[8]

[Endorsed]: #449. In the District Court of U.
S., Dist. of Idaho, Northern Division. In the Mat-
ter of Lane Lbr. Co., Ltd., a Corporation, Bankrupt.
Petition to File Amended Proof of Claim and

Amended Proof of Claim by Mary Wall. Filed this 13th day of June, 1912, at 9:00 A. M. L. L. Lewis, Referee. Kiger & Langley, Attorneys for Petitioner, Residing at Coeur d'Alene, Idaho. Filed Dec. 23, 1913. A. L. Richardson, Clerk. [9]

Exhibit "A" [Promissory Note].

Lane, Idaho, December 2, 1907.

\$750.00

On demand, after date, without grace we promise to pay to the order of Mary Wall Seven Hundred Fifty Dollars in gold coin of the United States of America, of the present standard value, with interest thereon, in like gold coin, at the rate of seven per cent per annum from date until paid, for value received. Interest to be paid annually and if not so paid, and whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay in addition to the costs and disbursements provided by statute, Fifty Dollars in like gold coin for attorney's fees in said suit or action.

LANE LUMBER CO., LTD.

Per P. H. WALL,

President.

Due on demand at Office Lane, Idaho.

[Seal]

M. K. WALL,

Secretary. [10]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

**Second Amended Proof of Claim of Mary Wall,
Secured Debt.**

State of Idaho,
County of Kootenai,—ss.

At Harrison, in said county of Kootenai, State of Idaho, in said district of Idaho, on the 21st day of August, 1912, came Mary Wall, of said city of Harrison, in the county, State and district aforesaid, and made oath and says that she filed her original proof of claim herein on September 7, 1912, and that by leave of Court first had and obtained she filed her amended proof of claim herein on June 13, 1912, and that by reason of objections thereto filed by the trustee of said bankrupt estate and under the instructions by the Court said proof of claim and amended proof of claim are hereby amended so as to segregate that portion thereof claimed as a secured debt from that portion thereof claimed as an unsecured debt, leave of Court therefor having been first had and obtained, and that she claims herein only that portion thereof claimed as a secured debt; that the Lane Lumber Company, Limited, a corporation, against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly indebted to said

deponent in the sum of nine hundred thirty-six and 35/100 dollars (\$936.35), the same being \$750 principal and \$186.35 interest thereon; that said debt is evidenced by and this claim is based upon the hereto attached promissory note marked Exhibit "A," and [11] made part hereof, dated December 2, 1907, for the sum of \$750, with interest thereon at the rate of 7% per annum from date until paid, executed and delivered by said bankrupt to deponent, who is now, and at all times herein mentioned has been, the owner and holder thereof; that the consideration of said debt and of the execution and delivery of said note is as follows, to wit;—that on or about December 2, 1907, deponent, being then the owner of the north half of the northeast quarter and the north half of the northwest quarter of section thirty-four, in township forty-nine north, range two east of Boise Meridian, in Shoshone County, State of Idaho, granted, bargained, sold and conveyed said premises to said bankrupt for the price of \$1350.00; that no part of said debt or price has been paid except the sum of \$600.00; and that said promissory note was executed and delivered by said bankrupt to deponent as an evidence of the unpaid part of said price; and that the only securities held by this deponent for said price are the following, to wit, that said debt is the unpaid part of the price of said premises sold as aforesaid and is unsecured otherwise than by the personal obligation of said bankrupt; and that neither at the present time nor at the time when said debt was first filed herein as a secured debt had said bankrupt sold or transferred said premises to any pur-

chaser or incumbrancer in good faith and for value; and that deponent asserts and claims a vendor's lien against said premises and against the proceeds resulting from any sale that may be made of the same by this Court or by said bankrupt or its successors; said claim of lien is based upon sections 3441 and 3443 of the Revised Code of the State of Idaho and upon the Bankruptcy Laws of the United States and upon the Rules and Practices of Courts of Equity.

Wherefore, deponent prays the Court to adjudge said debt, to wit, the sum of nine hundred thirty-six and 35/100 dollars (\$936.35), to be a lien against said premises, and to order [12] such premises sold for the highest and best price obtainable, and that said debt be paid as a secured debt out of the proceeds resulting from such sale, and that after all funds out of which said debt is entitled to be paid as a secured debt are exhausted, the deficiency, if any there shall be, be allowed and paid as an unsecured debt against said estate, and for such other and further relief as to the Court may seem meet and proper in the premises, and deponent's costs and disbursements in this proceeding expended.

MARY WALL,
Creditor.

Subscribed and sworn to before me this 21st day of August, A. D. 1912.

[Seal]

FRANK LANGLEY,
Notary Public. [13]

[Endorsed]: #449. In the District Court of the U. S. for the District of Idaho, Northern Division.

In the Matter of the Lane Lumber Company, Limited, a Corporation, Involuntary Bankrupt. Second Amended Proof of Claim of Mary Wall, Secured Debt. Amount, \$936.35. Record, p. 1421 to 1424. Filed this 22d day of August, 1912, at 2:15 P. M. L. L. Lewis, Referee. Filed Dec. 23, 1913. A. L. Richardson, Clerk. [14]

In the District Court of the United States for the District of Idaho, Northern Division.

No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

Order Allowing Secured Claim of Mary Wall.

The second amended proof of secured debt of Mary Wall, a creditor herein, and the objections of Samuel L. Boyd, trustee of said estate, the Northern Trust Company, Union Iron Works, Bank of California, Post, Avery & Higgins, and, all other objections thereto, having come regularly for hearing, Frank Langley appearing of counsel for said Mary Wall, and E. N. LaVeine, A. E. Russell, Reed & Boughton, and John H. Wourms appearing for the trustee, Bank of California, Post, Avery & Higgins, the petitioner creditors herein, and Harry L. Day, assignee of the State Bank of Commerce, respectively, H. M. Stephens appearing for the Carnegie Trust Company, and, after argument of respective counsel, the consideration of briefs submitted, and

entire matter having been first duly considered, and the Court being fully advised in the premises:

IT IS ORDERED that the said objections herein submitted, and each of them, be, and the same are, hereby overruled:

IT IS FURTHER ORDERED that the claim of the said Mary Wall be, and the same is, hereby allowed in the sum of Nine Hundred Thirty-six and 35/100 (\$936.35) Dollars:

IT IS FURTHER ORDERED that the said Mary Wall be, and she is hereby, declared to have a vendor's lien on the north half of the northeast quarter (N. $\frac{1}{2}$ NE. $\frac{1}{4}$) and the north half of the northwest quarter (N. $\frac{1}{2}$ NW. $\frac{1}{4}$) of section thirty-four (34), [15] township forty-nine (49), north range 2 E., B. M., Shoshone County, Idaho, the property of said bankrupt, for the said sum of Nine Hundred Thirty-six and 35/100 (\$936.35) Dollars, the purchase price thereof and the accrued interest thereon:

IT IS FURTHER ORDERED that the said trustee be, and he is hereby, directed to sell in accordance with law and the practice of this Court, the above-described real property, and the whole thereof (subject, however, to the prior lien of the Northern Trust Company, a corporation, and Augustus S. Peabody, Trustees, as disclosed by its proof of secured claim on file herein), and to apply the proceeds arising from said sale (after the said prior lien of the Northern Trust Company, and Augustus S. Peabody has been fully paid and satisfied) to the payment, satisfaction and discharge of the claim, constituting a vendor's lien on said property, of the said Mary Wall, the

residue and remainder of said proceeds, if any there be, to be passed to the proper fund of said estate:

AND IT IS FURTHER ORDERED that in the event that the above-described land does not sell for sufficient to satisfy and discharge, in full, the claim of the said Mary Wall for the said sum of Nine Hundred Thirty-six and $35/100$ (\$936.35) Dollars, as herein allowed (subject always to the prior lien of the Northern Trust Company and Augustus S. Peabody, as aforesaid); then such deficiency, if any there be, be, and the same is hereby, allowed as an unsecured claim against said estate.

Done in Coeur d'Alene, Idaho, in said District, this 31st day of July, A. D. 1913.

LAWRENCE L. LEWIS,

Referee in Bankruptcy. [16]

[Endorsed]: #449. In the Matter of the Lane Lumber Company, Limited, Involuntary Bankrupt. Order Allowing Secured Claim of Mary Wall. Filed as of June 31st, 1913, this 16th day of August, 1913, at 10:30 A. M. L. L. Lewis, Referee. Filed Dec. 23, 1913. A. L. Richardson, Clerk. [17]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

Petition for Review of Referee's Order.

**PETITION FOR REVIEW OF REFEREE'S
ORDER ALLOWING SECURED CLAIM OF
MARY WALL IN THE SUM OF \$936.35,
ESTABLISHING A VENDOR'S LIEN.**

To the Honorable Lawrence L. Lewis, Referee in
Bankruptcy.

Your petitioner respectfully shows:

That he is duly appointed, qualified and acting
trustee of the Lane Lumber Company, Limited, a cor-
poration, the above-named bankrupt;

That on August 22, 1912, Mary Wall filed her
second amended proof of claim of secured debt pray-
ing for the Court to adjudge the amount claimed in
said proof of debt, to wit, \$936.35 as a vendor's lien on
the north half (N. 1/2) of the northeast quarter
(NE.1/4) and the north half (N.1/2) of the northwest
quarter (NW.1/4) of section 34 of township 49 north,
range 2, E. B. M., Shoshone County, State of Idaho;

That thereafter on August 29, 1912, the trustee
herein filed objections to said second amended proof
of debt of Mary Wall above referred to;

That thereafter hearing was had and the matter
was submitted to the referee of the above-entitled
court;

That on August 16, 1913, the referee made and en-
tered an order herein decreeing to said Mary Wall
a vendor's lien on the above described land in the
aforesaid amount, a copy of which order is hereto at-
tached, made a part hereof and marked Exhibit "A."

That such order was and is erroneous in that:

1. That claimant is guilty of laches for waiting until after [18] the filing of the petition in bankruptcy herein which was filed on June 20, 1911, before attempting to assert her pretended vendor's lien.

2. That the title of the property of the bankrupt, including the land described in claimant's said proof of debt, passed to the trustee on September 26, 1911, and was thereupon and is still, "Vested with rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings," making the trustee's title paramount to that of the vendor lien claimant.

3. That prior to the filing of said claim, on, to wit, the 16th day of October, 1911, the trustee caused to be filed for record with the County Recorder of Shoshone County, Idaho, a duly certified copy of the order of adjudication herein, which was recorded in Book Q of Miscellaneous Records, on Page 485, which act vested the title of said north half (N.1/2) of the northeast quarter (NE.1/4) and the north half (N.1/2) of the northwest quarter (NW.1/4) of section 34, absolutely in the trustee, subject only to the valid liens asserted of record;

4. That the sum claimed to be the purchase price was far in excess of the reasonable value of the land described, at the date of the alleged sale; that the purchase thereof was not authorized by the Board of Directors;

5. That the said transfer was made by claimant, who was and is a relative of the officers of the bankrupt, to wit, a sister of the president, P. H. Wall, and a sister to the secretary M. K. Wall, of the bankrupt corporation, with a full knowledge of the embarrassed

financial condition of the bankrupt at the time of said purchase; that it was her duty at said time to secure the purchase price, if any purchase price was agreed upon, by action and ratification of the Board of Directors;

6. That the bankrupt, by its president, P. H. Wall, and its secretary, M. K. Wall, by order of the Board of Directors, [19] executed that certain mortgage and bond set forth in the secured proof of debt of the Northern Trust Company, #(139) S., filed herein and allowed as a secured debt, which has not been paid; that in said mortgage and bond said property was included therefore, and by said act the right to a vendor's lien by claimant was absolved, if any he had, as against the Northern Trust Company or the Trustee, and she is estopped at this time from asserting it, for the reason that claimant well knew that said mortgage and bond covered the above described property, and all property owned by the bankrupt or standing in its name, at the date of the execution of said mortgage and bond;

7. That claimant permitted said land to remain on the records of Shoshone County, Idaho, as unencumbered, except as to said Northern Trust Company under said mortgage and bond, thereby at all times fraudulently misrepresenting the true financial condition of the assets of the bankrupt to the creditors of the bankrupt, and its trustee at the time of his appointment, qualification and filing of said certified copy of said order of adjudication;

8. That the receipt of said promissory note, as alleged as evidence of the balance of said purchase

price, was given and received in payment of the debt for the balance of the purchase price of said land, and claimant is estopped, in view of said facts, and the facts above alleged, from asserting, claiming or perfecting a vendor's lien against the land.

9. That the bankrupt's schedules filed on August 22, 1911, do not disclose an indebtedness from the bankrupt to Mary Wall, in the sum of \$936.35, entitled to a vendor's lien;

10. That for the foregoing reasons claimant is estopped from asserting a vendor's lien; that section 47 of the Bankruptcy Act as amended in 1910, is a bar to said lien allowed by the Referee aforesaid; said order is against the law. [20]

WHEREFORE, your petitioner feeling aggrieved because of such order, prays that the same may be reviewed as provided by the Bankruptcy Act and General Orders.

SAMUEL L. BOYD,
Trustee.

Dated September 3, 1913.

State of Idaho,
County of Kootenai,—ss.

Samuel L. Boyd, the trustee and petitioner mentioned and described in the foregoing petition, does hereby make solemn oath that the statements contained in the foregoing petition are true according to the best of his knowledge, information and belief.

SAMUEL L. BOYD,
Trustee.

Subscribed and sworn to before me this 3d day of
September, 1913.

[Seal]

W. F. McNAUGHTON,
Notary Public.

E. N. LaVEINE,
Attorney for Trustee.

J. H. WOURMS,
Attorney for State Bank of Commerce.

POST, AVERY & HIGGINS and

A. E. RUSSELL,
Attorneys for Bank of California.

H. M. STEVENS,
Attorneys for Carnegie Trust Company. [21]

**Exhibit "A"—Order Allowing Secured Claim of
Mary Wall.**

*In the District Court of the United States District
of Idaho, Northern Division.*

#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

The second amended proof of secured debt of
Mary Wall, a creditor herein, and the objections of
Samuel L. Boyd, trustee of said estate, the Northern
Trust Company, Union Iron Works, Bank of Califor-
nia, Post, Avery & Higgins, and, all other objections
thereto, having come regularly for hearing, Frank
Langley appearing of counsel for said Mary Wall,
and E. N. La Veine, A. E. Russell, Reed & Bough-
ton, and John H. Wourms, appearing for the trustee,

Bank of California, Post, Avery & Higgins, the petitioning creditors herein, and Harry L. Day, assignee of the State Bank of Commerce, respectively, H. M. Stevens appearing for the Carnegie Trust Company, and, after argument of respective counsel, the consideration of briefs submitted the entire matter having been first duly considered, and the Court being fully advised in the premises:

IT IS ORDERED that the said objections herein submitted and each of them, be, and the same are, hereby overruled.

IT IS FURTHER ORDERED that the claim of the said Mary Wall be, and the same is, hereby allowed in the sum of Nine Hundred Thirty-six and 35/100 (\$936.35) Dollars;

IT IS FURTHER ORDERED that the said Mary Wall be, and she is, hereby declared to have a vendor's lien on the north half [22] (N.1/2) of the northeast (NE.1/4) quarter and the north half (N.1/2) of the northwest quarter (NW.1/4) of section thirty-four (34), township forty-nine (49), north range 2 E., B. M., Shoshone County, Idaho, the property of said bankrupt, for the said sum of Nine Hundred Thirty-six and 35/100 (\$936.35) Dollars, the purchase price thereof and the secured interest thereon;

IT IS FURTHER ORDERED that the said trustee be, and he is, hereby directed to sell in accordance with law and the practice of this Court, the above-described real property, and the whole thereof (subject, however, to the prior lien of the Northern Trust Company, a corporation, and Augustus S. Peabody, Trustees, as disclosed by its proof of

secured claim on file herein), and to apply the proceeds arising from said sale (after the said prior lien of the Northern Trust Company and Augustus S. Peabody has been fully paid and satisfied) to the payment, satisfaction and discharge of the claim, constituting a vendor's lien on said property, of the said Mary Wall, the residue and remainder of said proceeds, if any there be, to be passed to the proper fund of said estate;

AND IT IS FURTHER ORDERED that in the event that the above-described land does not sell for sufficient to satisfy and discharge, in full, the claim of the said Mary Wall for the said sum of Nine Hundred Thirty-six and 35/100 (\$936.35) Dollars, as herein allowed (subject always to the prior lien of the Northern Trust Company and Augustus S. Peabody, as aforesaid), then such deficiency, if any there be, be, and the same is, hereby allowed as an unsecured claim against the said estate;

Done at Coeur d'Alene, Idaho, in said District, this 31st day of July, A. D. 1913.

LAWRENCE L. LEWIS,
Referee in Bankruptcy. [23]

[Endorsed]: 449. In the District Court of the United States for the District of Idaho, Northern Division. In the Matter of Lane Lumber Company, Limited, a Corporation, Involuntary Bankrupt. Petition for Review of Referee's Order Allowing Secured Claim of Mary Wall, in the Sum of \$936.35, Establishing a Vendor's Lien. Before Lawrence L. Lewis, Referee in Bankruptcy. E. N. LaVeine, At-

torney for Trustee. Filed this 3d day of September, 1913, at 5:30 P. M. L. L. Lawrence, Referee. Filed Dec. 23, 1913. A. L. Richardson, Clerk. [24]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

IN BANKRUPTCY—No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

Report of Referee.

REPORT OF REFEREE IN BANKRUPTCY ON
AN ORDER ALLOWING SECURED CLAIM
OF MARY WALL IN THE SUM OF \$936.35,
AND ESTABLISHING VENDOR'S LIEN.

To the Honorable FRANK S. DIETRICH, District
Judge:

I, Lawrence L. Lewis, Referee in Bankruptcy, in
charge of the above-entitled proceedings, do hereby
certify:

1.

That in the course of said proceedings on, to wit,
the 31st day of July, 1913, an order was made and
filed herein allowing the claim of Mary Wall in the
sum of Nine Hundred Thirty-six and 35/100
(\$936.35) Dollars, and establishing a vendor's lien on
the real property described in said order for said
amount.

2.

That thereafter on, to wit, the 3d day of September, 1913, Samuel L. Boyd, trustee of the above-en-

titled estate, feeling aggrieved thereat, filed herein his petition for review, which said petition was duly granted.

3.

That a full, true and correct summary of the proceedings on which said order was made and based is as follows, to wit:

On, to wit, the 22d day of August, 1912, the second [25] amended proof of claim of secured debt of Mary Wall in the sum of Nine Hundred Thirty-six and 35/100 (\$936.35) Dollars was duly filed herein; that thereafter on, to wit, the 29th day of August, 1912, the objections of the trustee thereto were duly filed in said cause; that thereafter on, to wit, the 14th day of October, 1912, said second amended proof of secured claim and the trustee's objections thereto came regularly for hearing (See Record of Proceedings, pages 1320, 1421 to 1424, both inclusive); that thereafter, the brief of the trustee, herein, the brief of Mary Wall, the said claimant, and the brief of Post, Avery & Higgins et al., were respectively filed in said cause, after oral argument of the issues involved; and after the entire matter had been taken under advisement, the said order of the 31st day of July, 1913, was duly made and filed in said cause (a copy of which said order is attached to the petition for review on file in said proceedings and therein referred to and marked Exhibit "A"), to which said order the trustee, herein, duly excepted and submits that such order was and is erroneous in ten specific particulars, which said

particulars are fully set forth in his said petition for review.

THE PRECISE QUESTIONS SUBMITTED for consideration and decision are these:

1. Is the claimant, Mary Wall, estopped by laches, or otherwise, from asserting a vendor's lien against the land set forth and described in said order, under and by virtue of sections 3441 and 3443 of the Idaho Revised Codes?

2. Do sections 3441 and 3443 of the Idaho Revised Codes, providing for a vendor's lien against real property for the purchase price, or any part thereof, take precedence over the lien of the Trustees in bankruptcy as provided in section 47 of the Bankruptcy Act of 1898, as amended in 1910? That is, does section 47 of the Act of 1898, as amended in 1910, operate as a bar to [26] the assertion of a vendor's lien by Mary Wall, the said claimant, as provided for in sections 3441 and 3443 of the Idaho Revised Codes?

3. Is the order from which this review is taken erroneous in point of law?

I hand up, herewith, for the information of the Judge, the following records, files and papers, to wit:

1. Petition for Review.
2. Record of Proceedings, pages 1320; and pages 1421 to 1424, both inclusive.
3. Order allowing secured claim of Mary Wall.
4. Second amended proof of claim of Mary Wall, secured debt; and the trustee's objections thereto attached.
5. Brief of claimant (sent up with M. K. Wall files).

for the unpaid purchase price upon land sold, after an adjudication in bankruptcy against the vendee, the vendor having, prior to the institution of the bankruptcy proceedings, commenced no action to foreclose the lien.

It is conceded that such liens are recognized and established by the statutes of the State. Section 3441 of the Idaho Revised Codes is as follows: "One who sells real property has a vendor's lien thereon independent of possession for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." And section 3443: "The [28] liens of vendors and purchasers of real property are valid against everyone claiming under the debtor except a purchaser or incumbrancer in good faith and for value."

It is unnecessary to relate the facts involved, for the trustee concedes that such liens originally vested in the several vendors, the claimants here, which, if lost or divested at all, have been so lost or divested by reason of the institution of the bankruptcy proceeding, and for no other cause. Indeed the question for consideration is still further limited by the express concession on the part of the trustee, "that prior to the amendment to the bankruptcy act of 1910, amending Section 47, the vendor's lien might be established." We need, therefore, expressly decide only whether, upon the institution of a bankruptcy proceeding, the provisions of this amendment automatically operate to nullify or extinguish a pre-existing, valid vendor's lien. Section 47, so far as

pertinent, is as follows, the amendatory language being underscored:

“Sec. 47a. Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estate; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the Court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vester with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.” [29]

It will be noted that the amendment does not in terms purport to act upon liens or to prescribe the conditions under which they may be either created or enforced; it defines the status of a trustee in bankruptcy, and declares the scope of his rights and remedies. As suggested by counsel for the trustee here, not unlikely the controlling purpose of the amendment was, to relieve trustees from the disability imposed by the rule adopted by the courts, notably in such cases as *In re Economical Printing Co.*, 110 Fed. 514, and *York Mfg. Co. vs. Cassell*, 201 U. S. 304. But this rule relates not only to the validity of cer-

tain classes of liens under the state laws, but only to the right of the trustee to question claims that are defective or invalid under such laws. The rule is now, as it always has been, that with certain exceptions immaterial to the present inquiry, liens created by authority of, and in compliance with, the statutes of a state will be recognized and sustained in bankruptcy proceedings. The amendment of section 47 has in no wise affected this rule. Loveland on Bankruptcy (4th ed.), sec. 372. There is nothing in *Pacific State Bank vs. Coates*, 205 Fed. 618, out of harmony with this view. "Liens given or accepted in good faith and not in contemplation or in fraud upon the Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act." (Sec. 67d.) It is not questioned that these claims are in good faith, and that the liens were for a present consideration, and that no record thereof was required by the state statutes; as already stated, it is conceded that at the moment the bankruptcy proceeding was instituted the claims were valid subsisting liens. The act declares only that; "Claims which, for want of record or for other reasons, would not have been valid liens as against the claims of creditors of the [30] bankrupt, shall be liens against his estate." (Sec. 67a.) Here, then, is the test: Were these liens invalid against the creditors of the bankrupt merely because they were not recorded? If they were, then the trustee might, under the amendment to Section 47, challenge them;

his right so to do is conferred by the amendment, and that is its only purpose and effect; it does not operate directly upon the claims of lien. Now, as we have seen, under the Idaho statute a vendor's lien, though unrecorded, is valid as against all the world, excepting only "a purchaser or incumbrancer in good faith and for value." Unless, therefore, a trustee has, by virtue of the amendment to section 47 of the bankruptcy act, the status of such a purchaser or incumbrancer, he cannot assail the lien, for under the law it has validity against all other claims. The controversy is therefore reduced to the question merely of the meaning of the clause in the State statute, "purchaser or incumbrancer in good faith and for value." At most, if we assume that the lands here are in the custody of the Court, the trustee has the status only of a "creditor holding a lien by legal or equitable proceedings thereon," as, for example, the plaintiff in an attachment suit, or a judgment creditor after a levy of execution. But such a creditor is not a purchaser, nor is he an incumbrancer in good faith and for value." A citation of authorities upon this proposition is scarcely necessary.

The purpose and scope of the amendment, and the distinction between the claims here and cases to which it was intended to apply, may be illustrated by reference to another provision of the Idaho statutes: In Section 3408 of the Revised Statutes it is declared that unless a chattel mortgage is executed with the formalities therein prescribed and filed for public record, it is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers

of the property in good faith and for [31] value. Differing from vendor's liens, it will be observed, such an unrecorded mortgage is void not only against purchasers and incumbrancers, but against "creditors." Prior to the amendment of section 47, it was quite generally held that a trustee in bankruptcy could not, upon behalf of general creditors, assail the validity of such an instrument, because such creditors, having no specific lien upon the property, were in no position to make the attack, and therefore the trustee, acting upon their behalf, could assert no better right. *In re Economical Printing Co.*, 110 Fed. 514. *Remington on Bankruptcy*, sections 1207½ to 1210. The amendment meets this emergency by conferring upon him the status of a creditor who has such lien, and may therefore object to the assertion of a lien under an unrecorded mortgage. See, also, section 3170, which provides that transfers of personal property not accompanied by delivery of possession to the transferee are void not only against incumbrancers and purchasers, but also against "creditors." Possibly Congress might have conferred upon trustees all the rights and remedies of a purchaser or incumbrancer for value and in good faith, but it has not done so; it has chosen to limit such rights and remedies to those of one holding a lien arising out of legal or equitable proceedings.

It is unimportant that the claimants did not commence actions to foreclose their liens prior to the institution of the bankruptcy proceedings. A suit to foreclose a lien is not material to its validity. The lien is established by operation of law, and is quite

as complete before as after the institution of the proceedings to foreclose it.

It follows that the referee was right in holding that as a matter of law the claimants were entitled to liens. The record suggests some other questions, such as whether the claimants, or any of them, are estopped to assert their claims, or whether the [32] trustee should be subrogated to the rights of the mortgagee or trustee in a trust deed securing a large issue of bonds covering these and other lands, which indebtedness the trustee has now paid, but they have not been argued, and I therefore express no opinion relative thereto. The order of the referee will in each case be affirmed. [33]

[Endorsed]: No. 449. In the U. S. District Court for the District of Idaho, Northern Division. In the Matter of the Lane Lumber Company, Bankrupt. Memorandum Decision Covering Petition for Review Brought by the Trustee and Involving the Validity of Three Vendors' Lien Claims, Namely, Those of M. K. Wall, Joseph Brown and Mary Wall. Filed December 2, 1913. A. L. Richardson, Clerk. [34]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

IN BANKRUPTCY—#449.

MARY WALL VENDOR LIEN CLAIM OF
\$936.35.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation.

Involuntary Bankrupt.

Findings of Fact and Conclusions of Law.

The vendor lien claim of Mary Wall in the sum of \$936.35 came on regularly before the Court without a jury, on petition of the trustee for review of the order made herein by the referee, and from the facts presented by the pleadings, and the records, the Court finds the facts as follows, to wit:

I.

That on December 2, 1907, Mary Wall, the claimant herein, sold and conveyed to the Lane Lumber Company, Limited, a corporation, bankrupt above named, by warranty deed, for the price of \$1,350, at which time \$600 of such price was paid, the north half of the northeast quarter (N. $\frac{1}{2}$ NE. $\frac{1}{4}$), and the north half of the northwest quarter (N. $\frac{1}{2}$ NW. $\frac{1}{4}$) of section 34, twp. 49 north, range 2 E., B. M., Shoshone County, State of Idaho; that there is now, and was on, to wit, the 20th day of June, 1911, the date of filing of the petition against said bankrupt, due and owing on said purchase price and interest thereon from the bankrupt to Mary Wall, the said claimant, the sum of \$936.35, which said sum is, and was at all times hereinbefore mentioned, wholly unpaid and unsecured otherwise than by the personal obligation of the buyer, the said Lane Lumber Company, Ltd.

II.

That on July 29, 1911, the said Lane Lumber Company, Ltd., was adjudged an involuntary bankrupt.

III.

That on September 22, 1911, Samuel L. Boyd qualified as trustee of the estate of said bankrupt, and had

continued to and now is acting as such trustee. [35]

IV.

That on September 7, 1911, the claimant, Mary Wall, filed herein her claim against said bankrupt for the said sum of \$936.35, as an unsecured debt; that on August 22, 1912, by leave of Court first had and obtained, she filed herein the second amended proof of secured debt claiming said sum of \$936.35 as a vendor's lien against the property of the bankrupt described as the north half of the northeast quarter (N. $\frac{1}{2}$ NE. $\frac{1}{4}$), and the north half of the northwest quarter (N. $\frac{1}{2}$ NW. $\frac{1}{4}$), of section 34, twp. 49 north, range 2 E., B. M., Shoshone County, State of Idaho.

V.

That on August 29, 1912, the trustee filed objections to said proof of secured debt.

VI.

That on July 31, 1913, the Honorable Lawrence L. Lewis, referee herein, made and filed an order overruling said objections and allowing said claim as a secured debt and vendor's lien.

VII.

That on September 3, 1913, the attorney for the trustee filed his petition for review of the order of the referee allowing said claim in the sum of \$936.35, establishing a vendor's lien upon said lands.

VIII.

That on November 19, 1913, the referee filed his report with the clerk of this court bearing upon said claim and therewith transmitted all of the papers above mentioned and the record of proceedings had

before the referee herein, being pages 1320, 1421 to 1434, inclusive.

IX.

That the claimant is not guilty of laches for waiting until after the filing of the petition in bankruptcy on June 20, 1911, before attempting to assert her vendor's lien. [36]

X.

That the title to all of the property of the bankrupt, including the lands described in claimant's vendor's lien, passed to the trustee on September 26, 1911, who was thereupon and is still "vested with rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings," but that such "rights," etc., are subordinate to said claimant's vendor's lien.

XI.

That the trustee had no notice of vendor's lien until it was filed with the referee herein.

XII

That the appraised value of the land on which the vendor's lien is claimed, placed thereon by the appraisers, is \$500.00.

XIII.

That Mary Wall permitted said land to remain on the records as unincumbered until the filing of her proof of claim herein.

Conclusions of Law.

As a conclusion of law from the foregoing facts, the Court finds that the referee's order complained of by the trustees should be affirmed and said vendor's lien decreed on the property described therein under sec-

tions 3441 and 3443 I. R. C., and under the bankruptcy Act of 1898 and amendments.

Dated December 13, 1913.

FRANK S. DIETRICH,

District Judge.

The foregoing findings are made, in response to a suggestion by counsel for the trustee, as a statement of the facts and of the theory upon which the order of December 2d, 1913, was made affirming the referee's order.

Dated December 13, 1913.

FRANK S. DIETRICH,

Judge. [37]

[Endorsed]: No. 449. In the District Court of the United States for the District of Idaho, Northern Division. In the Matter of the Lane Lumber Company, Limited, a Corporation, Involuntary Bankrupt. Findings of Fact and Conclusions of Law on Second Amended Proof of Claim of Mary Wall, Secured Debt, \$936.35. Filed December 13, 1913. A. L. Richardson, Clerk. [38]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

IN BANKRUPTCY—No. 449.

MARY WALL VENDOR LIEN CLAIM OF
\$936.35.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation, Involuntary Bank-
rupt.

Judgment.

In the above-entitled matter the petition of the trustee in bankruptcy for the review of an order of the referee in bankruptcy recognizing and allowing the claim of Mary Wall for \$936.35 as a lien (vendor's) upon the north half of the northeast quarter, and the north half of the northwest quarter of section 34, township 49 north, range 2 east, B. M., Shoshone County, State of Idaho, under sections 3441 and 3445 of the Idaho Revised Codes, and under the bankruptcy act as amended, came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that said order of the referee be, and the same is, hereby affirmed.

Dated this 23d day of December, 1913.

FRANK S. DIETRICH,

Judge. [39]

[Endorsed]: No. 449. In the District Court of the United States for the District of Idaho, Northern Division. In the Matter of the Lane Lumber Company, Limited, a Corporation, Involuntary Bankrupt. In Bankruptcy. No. 449. Mary Wall Vendor Lien Claim of \$936.35. Judgment. Filed December 23, 1913. A. L. Richardson, Clerk. [40]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

**Petition by Trustee for Appeal and Order Allowing
Same.**

PETITION OF SAMUEL L. BOYD, TRUSTEE
IN BANKRUPTCY, OF THE LANE LUM-
BER COMPANY, LIMITED, A CORPORA-
TION, BANKRUPT.

To the Honorable F. S. DIETRICH, District Judge
of the District Court of the United States for the
District of Idaho, Northern Division:

Samuel L. Boyd, the duly appointed, qualified and
acting trustee, of the above-named bankrupt, conceiv-
ing himself, as such trustee, and the unsecured cred-
itors of the above-named bankrupt, aggrieved by the
judgment made and entered on the 23d day of Decem-
ber, 1913, in the above-entitled matter, affirming the
referee herein and establishing a vendor's lien in
favor of Mary Wall, in the sum of \$936.35, on the
north half of the northeast quarter (N.1/2 NE.1/4)
and the north half of the northwest quarter (N.1/2
NW. 1/4), of section 34, twp. 49 north, range 2 E.,
B. M., Shoshone County, State of Idaho, does hereby
appeal from such judgment to the United States Cir-
cuit Court of Appeals for the Ninth Circuit, for the
reason specified in the Assignments of Error, which is

filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. [41]

E. N. LaVEINE,

Attorney for Samuel L. Boyd, Trustee of the Lane Lumber Co., Limited, a Corporation, Bankrupt.

I hereby waive citation.

FRANK LANGLEY,
Attorney for Mary Wall.

Order.

The foregoing claim of appeal is allowed.

FRANK S. DIETRICH,
District Judge.

Dated December 23, 1913.

Filed December 23, 1913. A. L. Richardson, Clerk.
[42]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

Assignments of Error by Trustee.

ASSIGNMENTS OF ERROR, BY TRUSTEE, TO
ALLOWANCE OF CLAIM OF MARY
WALL, AS A VENDOR'S LIEN, IN THE
SUM OF \$936.35.

Comes now Samuel L. Boyd, as trustee in bank-

ruptcy of the Lane Lumber Company, Limited, a corporation, bankrupt, by E. N. LaVeine, his attorney, and says that the judgment in said matter creating said vendor's lien is erroneous and against the just rights of said trustee, and the creditors of the bankrupt, for the following reasons:

First: That on account of claimant's delay in attempting to assert said vendor's lien she is estopped from asserting said lien as against the trustee.

Second: Because the statutes of the State of Idaho, secs. 3441 and 3443, Idaho Revised Codes, under which Mary Wall's \$936.35 vendor lien claim was sustained, had no application to the facts and the law upon which the court sustained said lien, as against the trustee's title.

Third: Because the trustee in bankruptcy, under the Bankruptcy Act, had greater rights as against said Mary Wall and her claim for vendor's lien, than the bankrupt itself.

Fourth: Because under the Bankruptcy Act the trustee was vested with the title to said land paramount to that of the vendor lien claimant. [43]

Fifth: Because the findings, judgment and decree of this Court sustaining the action of the referee allowing said claim for \$936.35, as a vendor's lien, is erroneous, illegal and against the law.

WHEREFORE, the said Samuel L. Boyd, trustee in bankruptcy, of the said Lane Lumber Company, Limited, a corporation, *bankruptcy*, prays that said order, judgment and decree, affirming the action and ruling of the referee allowing the claim of said Mary Wall, as a vendor's lien, in the sum of \$936.35, be re-

versed and that the Court may be directed to enter a decree reversing the action of the referee in establishing said vendor's lien.

E. N. LaVEINE,

Attorney for Samuel L. Boyd, Trustee of the Lane Lumber Co., Limited, a Corporation, Bankrupt.

Filed December 23, 1913. A. L. Richardson, Clerk.
[44]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation, Involuntary Bankrupt.

Praeipce [for Transcript of Record].

PRAECIPE, BY TRUSTEE, FOR TRANSCRIPT OF RECORD ON MARY WALL VENDOR LIEN CLAIM IN THE SUM OF \$936.35.

To Honorable A. L. RICHARDSON, Clerk of the United States District Court:

You are hereby respectfully requested to prepare a transcript of the following described papers with the date of filing endorsed thereon, in the above-entitled proceeding:

1. Mary Wall's proof of unsecured debt, for \$1,066.25, with exhibit attached thereto, filed with the referee on September 7, 1911.

2. Amended proof of claim of Mary Wall, for \$936.35, as a secured claim, and \$87.00 as an un-

secured claim, with exhibit attached thereto, filed with the referee on June 13, 1912.

3. Second amended proof of claim of Mary Wall, secured debt, for \$936.35, with exhibit attached thereto, filed with the referee on August 22, 1912.

4. Order of referee allowing said amended proof of secured debt for \$936.35, filed as of July 31, 1913, on the 16th day of August, 1913.

5. Petition, by trustee, for review of referee's said order, filed with the referee on September 3, 1913.
[45]

6. Report of referee, Lawrence L. Lewis, on his order allowing above claim, filed with the Clerk of the United States District Court on November 19, 1913.

7. Memorandum decision of the District Judge, filed December 2, 1913, affirming order of referee filed as of July 31, 1913, on the 16th day of August, 1913, allowing said claim as a vendor's lien.

8. Findings of fact and conclusions of law by District Judge, filed December 13, 1913.

9. Judgment or decree by District Judge, filed December 23d, 1913.

10. Petition for appeal, by trustee, and order allowing same, filed December 23d, 1913.

11. Assignments of Error, by trustee, filed December 23d, 1913,

12. This praecipe, with attached stipulation, filed December 23d, 1913.

Dated December 23d, 1913.

E. N. LaVEINE,
Attorney for Samuel L. Boyd, Trustee.

[Stipulation as to Transcript of Record on Appeal.]

In order to facilitate the appeal in this matter, it is hereby stipulated between Frank Langley, attorney for claimant, Mary Wall, and E. N. LaVeine, attorney for Samuel L. Boyd, trustee, that the papers included in the foregoing praecipe, when certified by the clerk of this court, shall constitute the transcript of record on appeal to the Circuit Court of Appeals.

It is expressly agreed and understood that the lien claimant, Mary Wall, by her stipulation herein does not waive her right to move to dismiss this appeal on the ground that the matter involved should be presented by petition for revision instead of by appeal.

FRANK LANGLEY,

Attorney for Mary Wall, Claimant. Address: Coeur d'Alene, Idaho, Otterson Bldg.

E. N. LaVEINE,

Attorney for Samuel L. Boyd, Trustee. Address: Coeur d'Alene, Idaho, Giguere Bldg. [46]

[Endorsed]: No. 449. In the District Court of the United States for the District of Idaho, Northern Division. In the Matter of the Lane Lumber Company, a corporation, Involuntary Bankrupt. In re Mary Wall Vendor Lien Claim for \$936.35. Petition by Trustee for Appeal, Order Allowing the Same, Assignments of Error, Praecipe. Filed December 23, 1913. A. L. Richardson, Clerk. [47]

Return to Record.

On presentation of the foregoing it is ordered by the Court that a transcript of the record, as above

stipulated, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal]

Attest: A. L. RICHARDSON,

Clerk. [48]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

In the District Court of the United States for the District of Idaho, Northern Division.

#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript consisting of Mary Wall's proof of unsecured debt, for \$1,066.25, with exhibit attached thereto; amended proof of claim, of Mary Wall, for \$936.35, as a secured claim, and \$87.00 as an unsecured claim, with exhibit attached thereto; second amended proof of claim, of Mary Wall, secured debt, for \$936.35, with exhibit attached thereto; order of referee allowing said proof of secured debt for \$936.35; petition, by trustee, for review of referee's said order; report of referee, Lawrence L. Lewis, on his order allowing said claim; memorandum decision, by District Judge; findings of fact and conclusions of law, by District Judge; judgment or decree, by the District Judge; petition for appeal, by trustee, and order allowing same; assignments of er-

rors, by trustee; praecipe, with attached stipulation, each and all to be full, true and correct copies of the pleadings and proceedings in the above-entitled matter, prepared according to the praecipe heretofore set forth, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of record herein amounts to the sum of \$27.70, and that the same has been paid by the appellant.

Witness my hand and the seal of said District Court, affixed at Boise, Idaho, this 26th day of December, 1913.

[Seal]

A. L. RICHARDSON,
Clerk. [49]

[Endorsed]: No. 2364. United States Circuit Court of Appeals for the Ninth Circuit. Samuel L. Boyd, as Trustee in Bankruptcy of the Lane Lumber Company, Limited, a Corporation, Bankrupt, Appellant, vs. Mary Wall, Appellee. In the Matter of the Lane Lumber Company, Limited, a Corporation, Bankrupt. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Received and filed December 29, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt,

Appellant,

v.

MARY WALL,

Appellee.

In the Matter of THE LANE LUMBER COM-
PANY, LIMITED, a Corporation, Involuntary
Bankrupt.

Upon appeal from the United States District Court
for the District of Idaho, Northern Division.

Brief of Appellant, Samuel L. Boyd, Trustee.

E. N. LA VEINE,
Attorney for Appellant,
Samuel L. Boyd, Trustee,
Coeur d'Alene, Idaho,

JOHN H. WOURMS,
Amicus Curiae,
Wallace, Idaho.

Filed this.....day of February, 1914.

FILED

Clerk.

FEB 5 - 1914

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt,

Appellant,

v.

MARY WALL,

Appellee.

In the Matter of THE LANE LUMBER COMPANY, LIMITED, a Corporation, Involuntary Bankrupt.

Upon appeal from the United States District Court
for the District of Idaho, Northern Division.

Brief of Appellant, Samuel L. Boyd, Trustee.

E. N. LA VEINE,
Attorney for Appellant,
Samuel L. Boyd, Trustee,
Coeur d'Alene, Idaho,

JOHN H. WOURMS,
Amicus Curiae,
Wallace, Idaho.

THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
ED, a Corporation, Bankrupt,

Appellant,

v.

MARY WALL,

Appellee.

In the Matter of THE LANE LUMBER COM-
PANY, LIMITED, a Corporation, Involuntary
Bankrupt.

Upon appeal from the United States District Court
for the District of Idaho, Northern Division.

STATEMENT OF THE CASE.

The appellee, Mary Wall, claims a vendor's lien on certain property belonging to the bankrupt, which has been resisted by the trustee, the proceedings thereon are as follows:

That on June 20, 1911, a petition was filed by various creditors to have the Lane Lumber Company, Limited, a corporation, adjudged a bankrupt (Trans. p. 34) and said corporation was adjudged a bankrupt on July 29, 1911 (Trans. p. 32).

On December 2, 1907, Mary Wall conveyed to the Lane Lumber Company, the N $\frac{1}{2}$ NE $\frac{1}{4}$ and the N $\frac{1}{2}$

NW $\frac{1}{4}$ of section 34, Twp. 49 north, range 2, E. B. M., Shoshone County, Idaho, for the agreed purchase price of \$1350.

That Mary Wall permitted said land to remain on the records as unincumbered until the filing of her proof of claim. (Trans. p. 34). That on September 22, 1911, Samuel L. Boyd qualified as trustee of the estate of the bankrupt, and has continued to and is now acting as such trustee. (Trans. p. 32). The trustee had no notice of said vendor's lien until it was filed with the referee. (Trans. p. 34). On September 7, 1911, appellee filed her proof of unsecured debt for the purchase price of said land. (Trans. p. 4.) On June 13, 1911, appellee filed an amended proof claiming a vendor's lien (Trans. p. 8). On August 22, 1912, appellee filed a second amended proof claiming a vendor's lien in the sum of \$936.35 (Trans. p. 12), under Sections 3441 and 3443, Idaho Revised Codes, which are in words and figures as follows:

"Sec. 3441. One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

"Sec. 3443. The liens of vendors and purchasers of real property are valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value."

The appraised value of the land, on which the vendor's lien is claimed, is \$500 (Trans. p. 34). On August 29, 1912, the trustee filed objections to said proof of secured debt (Trans. p. 33), the referee overruled the objections and allowed the proof of secured debt as a vendor's lien, on July 31, 1913, and on Sept. 3, 1913, petition for review was filed by the trustee. (Trans. p. 33.) On November 19, 1913, the referee filed his report thereon with the Clerk of the United States District Court. (Trans. p. 33.) Honorable F. S. Deitrich, United States District Judge, after hearing, on December 2, 1913, rendered his memorandum decision affirming the referee in establishing said vendor's lien. (Trans. p. 25.) Findings of fact and conclusions of law were caused to be filed by the District Judge on December 13, 1913, and judgment thereon was filed December 23, 1913 (Trans. pp. 35 and 36).

ASSIGNMENTS OF ERROR.

1. The court erred in not deciding that Mary Wall was estopped from asserting a vendor's lien on account of her laches.

2. The court erred in sustaining the Mary Wall vendor's lien claim under Sections 3441 and 3443 Idaho Revised Codes, against the contention of the trustee.

3. That the court erred in not deciding that the trustee under the Bankruptcy Act held title to the land in controversy paramount to Mary Wall's vendor lien right.

4. That the court erred in not denying said vendor's lien.

5. That the decree of the District Court allowing said vendor's lien is against the law.

ARGUMENT.

Referring to the first assignment of errors.

It will be observed that appellee sold her land to the Lane Lumber Company on September 2, 1907, three and one-half years before the bankruptcy of the Lane Lumber Company. The note which is set forth in the proof as evidence of the balance due on the purchase price of the land is a demand note and no interest was ever paid thereon. (Trans. p. 8).

In none of the three proofs filed has claimant made any showing or offered any excuse for her delay in not impressing her vendor's lien claim upon the land referred to prior to bankruptcy. Mary Wall permitted the land in dispute to stand in the name of the bankrupt unincumbered; the loan of \$125,000 by the Northern Trust Company, referred to in former proceedings had in this court, was undoubtedly made in reliance upon the unincumbered ownership, by the

bankrupt of all the property of which it held the record title, a part of which was the land in question. The loan of approximately \$200,000 from the State Bank of Commerce, \$98,000 from the Bank of California and \$75,000 from the Carnegie Trust Company were all based on the company's holdings free of incumbrance, except that held by the Northern Trust Company.

Undoubtedly it will be contended by appellee that no delay short of the period fixed by the analogous statute of limitations can constitute laches unless it affirmatively appears that the delay worked a prejudice.

"We do not so understand the law. It is true that it is only prejudicial delay which constitutes laches; but it does not follow that such prejudice must always be affirmatively shown. At least in some cases any unnecessary delay is presumed to have caused injury; and it is incumbent upon the complainant *to make a satisfactory showing or excuse for the delay.*"

McNeil v. McNeil et al., 170 F. 289-291, C. C. A. 9th Circuit.

It is a fact that the claimant, as an unsecured creditor, had a right to and did participate in the administration of the estate and had the right to and did vote as an unsecured creditor.

It is also true that taxes were paid upon the land

by the trustee and other expenses were incurred by him in looking after and protecting the land in controversy.

It is also true that he has paid in full a trust deed covering this, together with other lands, which secured a large issue of bonds of the bankrupt company on the land sought to be impressed with a vendor's lien by the petitioner.

Practically all of the claims of unsecured creditors, aggregating several hundreds of thousands of dollars, have been allowed by the court.

The trustee takes the position that on account of the gross negligence and laches of the appellee that she was and is estopped from asserting her lien sought to be impressed upon a portion of the property of the bankrupt and that under Section 47a the trustee is vested with a lien paramount to that which the petitioner claims and which if allowed will enable her to obtain an advantage over the other creditors to which, on account of her negligence and laches, she is not entitled.

There has been such laches that the court would be very unjust to the creditors and to the trustee should it allow the claim.

There is no pretense of fraud, concealment, surprise or newly discovered evidence.

There should be a reasonably speedy disposition

of bankruptcy matters and no such precedent, as this would be, should be established.

There is no showing by appellee, Mary Wall, which would overcome her negligence and laches.

In re Ives 113 F. 911, C. C. A. 6th Circuit.

Referring to the second, third, fourth and fifth assignments of error.

These assignments are all discussed at length in the case of Samuel L. Boyd, as trustee, v. M. K. Wall, §2363, which just preceded. The appellee in the former case transferred his land in 1911 and the appellee in this case transferred her land in 1907.

There are several other claimants who sold land to the bankrupt, as did the appellee, who as yet have not sought to burden this estate with liens, natural equity seems to have told them that their delay has forfeited their rights. If this lien is allowed this estate will have a deluge of liens to litigate and the circumstances which have existed and now exist with reference to the administration of this estate require the application of the doctrine of laches against the appellee.

We submit that in fairness to the credit world and in order to make the operation of the Bankruptcy Act uniform throughout these United States the judgment of the District Judge allowing the vendor's

lien of Mary Wall in the sum of \$936.35 should be reversed.

E. N. LAVEINE,
Attorney for Trustee,
Address: Coeur d'Alene, Idaho.
JOHN H. WOURMS,
Amicus Curiaë,
Address: Wallace, Idaho.

A copy of the foregoing brief received this.....
day of Feb. 1914, at Coeur d'Alene Idaho.

Attorney for Appellee.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt,

Appellant,

v.

MARY WALL, Appellee.

In the Matter of THE LANE LUMBER COMPANY, LIMITED, a Corporation, Involuntary Bankrupt.

Upon appeal from the United States District Court
for the District of Idaho, Northern Division.

BRIEF OF APPELLEE, MARY WALL.

FRANK LANGLEY,
Attorney for Appellee.
Coeur d'Alene, Idaho,

Filed this.....day of February, 1914.

.....
Clerk.

FILED

FEB 9 - 1914

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt,

Appellant,

v.

MARY WALL,

Appellee.

In the Matter of THE LANE LUMBER COMPANY, LIMITED, a Corporation, Involuntary Bankrupt.

Upon appeal from the United States District Court
for the District of Idaho, Northern Division.

BRIEF OF APPELLEE, MARY WALL.

FRANK LANGLEY,
Attorney for Appellee.
Coeur d'Alene, Idaho,

THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
ED, a Corporation, Bankrupt,

Appellant,

v.

MARY WALL,

Appellee.

In the Matter of THE LANE LUMBER COM-
PANY, LIMITED, a Corporation, Involuntary
Bankrupt.

Upon appeal from the United States District Court
for the District of Idaho, Northern Division.

STATEMENT OF THE CASE.

The Record herein shows the following facts:

That on December 2, 1907, the Appellee, Mary
Wall, sold and conveyed to the Lane Lumber Com-
pany, Bankrupt, the $N\frac{1}{2}$ of the $NE\frac{1}{4}$ and the $N\frac{1}{2}$ of
the $NW\frac{1}{4}$ of section 34, Twp. 49 N., Range 2 E. B.
M., Shoshone County, Idaho, for the agreed pur-
chase price of \$1350.00, at which time \$600.00 of
said price was paid, and the balance thereof, to-wit,
\$750.00, with interest, making in all the sum of
\$936.35, is now due and owing from the bankrupt to

Mary Wall and is wholly unpaid and unsecured otherwise than by the personal obligation of the buyer (Record p. 32); on June 20, 1911, a petition was filed by various creditors to have the said Lane Lumber Company, Ltd., a corporation, adjudged a bankrupt (Record p. 34); on July 29, 1911, said corporation was adjudged a bankrupt (Record p. 32); on September 22, 1911, Samuel L. Boyd qualified as trustee of the estate of the bankrupt, and has continued to and is now acting as such trustee (Record p. 32), and, as such trustee, had no notice of said vendor's lien until the same was filed with the referee, Lawrence L. Lewis (Record p. 34); on September 7, 1911, Mary Wall filed her claim against the bankrupt for said unpaid purchase price and interest as an unsecured debt (Record p. 1); on June 13, 1912, by leave of Court, Appellee filed an amended proof claiming a vendor's lien against said lands (Record pp. 4 to 8); on August 22, 1912, by leave of Court, Appellee filed a second amended proof claiming a vendor's lien against said lands for such unpaid purchase price, with interest, under Sections 3441 and 3443 of the Idaho Revised Codes (Record pp. 9 to 12); on August 29, 1912, the trustee filed Objections to said second amended proof of secured debt (Record p. 33); on July 31, 1913, the Referee overruled said Objections and allowed said second amended proof as a vendor's

lien against the above described property of the bankrupt (Record pp. 19 to 22); the appraised value of the land against which the vendor's lien was so allowed is \$500.00; on September 3, 1913, Petition for Review was filed by the trustee (Record pp. 15 to 19); on November 19, 1913, the referee filed his Report thereon with the Clerk of the United States District Court (Record pp. 22 to 25); on December 2, 1913, the Honorable Frank S. Dietrich, U. S. District Judge, rendered his Memorandum Decision affirming the referee in establishing said vendor's lien (Record pp. 25 to 31); on December 13, 1913, Findings of Fact & Conclusions of Law were caused to be filed by the District Judge (Record pp. 31 to 35); and, on December 23, 1913, Judgment thereon was filed by the District Judge (Record pp. 35 & 36).

ARGUMENT.

The facts in this case are not in dispute, and the only questions involved are questions of law. The facts and the issues involved, and the relief prayed for in this Appeal are practically the same as in the case which immediately precedes, being case No. 2363 entitled Samuel L. Boyd, as Trustee, Appellant, vs. M. K. Wall, Appellee. Both cases are prosecuted for the purpose of enforcing vendor's liens against lands belonging to the bankrupt. In the former case the

Appellee's brief on Appeal goes fully into the issues involved and the law applicable thereto; and, by reference thereto, I adopt the argument and authorities found in Appellee's brief in said case No. 2363 as my argument and authorities herein.

Briefly stated, the vendor's lien is claimed under Sections 3441 and 3443, Idaho Revised Codes, and Section 67 (d) of the Bankruptcy Act of 1898, as amended in 1910.

Section 3441, Idaho Revised Codes, reads:

"One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer".

Section 3443, Idaho Revised Codes, reads:

"The liens of vendors and purchasers of real property are valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value."

Section 67 (d) of the Bankruptcy Act of 1898, as amended, reads:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon the Act, and for a present consideration, which have been recorded according to the law, if re-

cord thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act."

The trustee has conceded that a vendor's lien originally vested in the claimant, and that, if lost or divested at all, it has been so lost or divested by reason of the institution of the bankruptcy proceedings, and for no other cause. And the trustee has further conceded that, prior to the amendment of the Bankruptcy Act in 1910, amending section 47, the vendor's lien might be established (Record p. 26). There, then, remains for the court to decide, only the question of the effect of said amendment. This question is fully covered by the argument and authorities found in the Appellee's brief in said case No. 2363.

Evidently for the purpose of getting away from the issues counsel for Appellant has gone outside of the record. With the exception of the statement made in the first paragraph of the argument in Appellant's brief, there is not one statement of fact, among the many made in such argment, that is based upon or supported by the Record herein. Counsel and the Court are limited to the trustee's assignments of error (Record pp. 38 to 40, and 15 to 18, respectively), and to the Findings of Fact of the District Judge (Record pp. 31 to 35).

In his Petition for Review of the referee's order allowing the vendor's lien in question (Record p. 15), the trustee assigns as error, at page 16 of the Record, "that claimant is guilty of laches for waiting until after the filing of the Petition in Bankruptcy on June 20, 1911, before attempting to assert her pretended vendor's lien." The trustee now attempts to enlarge the period covered by the objection of laches. This he cannot do. He has already conceded that at the time of the commencement of the bankruptcy proceedings the lien might be enforced (Record p. 26). And the said assignment of error in Petition for Review (Record p. 16) limits the trustee's right to complain of laches, on the part of the lien claimant to the time when the trustee has already so conceded that the vendor's lien might be enforced. Section 3443, Idaho Revised Codes, *supra*, establishes the sole manner in which the vendor's lien can be lost in Idaho.

The case of *McNeil v. McNeil*, 170 Fed. 289, cited in Appellant's brief at page 6, was an action to vacate a decree of divorce, and involved issues of fact and of law entirely different from those involved in the case at bar.

The case of *In re Ives*, 113 Fed. 911, cited in Appellant's brief at page 8, was a proceeding to vacate a decree of adjudication of bankruptcy where other rights had intervened between the entry of the de-

cree and the initiation of the proceedings to vacate; and the court held that the showing made in support of the petition to vacate was insufficient. While in the case at bar no rights have intervened.

In view of the facts involved, and of said Sections of the Statutes of Idaho, and of the Bankruptcy Act, I respectfully submit that the Judgment of the Honorable District Judge establishing a vendor's lien in favor of the claimant should be affirmed.

Respectfully submitted,

FRANK LANGLEY,

Attorney for Appellee,

Coeur d'Alene, Idaho.

Service of the foregoing Brief of Mary Wall, Appellee, is hereby accepted, by the receipt of a copy thereof, this 22th day of February,
A. D., 1914.

E. N. LaVine.

Attorney for Trustee.

copy.

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOHANNA HIRLINGER,

Petitioner,

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
the LANE LUMBER COMPANY, LIM-
ITED, a Corporation, Bankrupt,
Respondent.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation, Bankrupt.

Petition for Revision and Transcript of
Record in Support Thereof

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, of a Certain Order and Judgment of
the United States District Court
for the District of Idaho,
Northern Division.

FILED

JAN 17 1914

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOHANNA HIRLINGER,

Petitioner,

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
the LANE LUMBER COMPANY, LIM-
ITED, a Corporation, Bankrupt,
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In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation, Bankrupt.

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Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, of a Certain Order and Judgment of
the United States District Court
for the District of Idaho,
Northern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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under the debtor, except a purchaser or incumbrancer in good faith and for value."

That on the 22d day of September, 1913, the trustee of said Lane Lumber Company filed with the referee objections to said petition, a certified copy of which objections is hereto attached, made part hereof, and marked Exhibit "AB."

That on the 21st day of October, 1913, the referee made an order therein granting your petitioner the relief prayed for in said petition, a certified copy of which order is hereto attached, made part hereof, and marked Exhibit "AC."

That on the 10th day of November, 1913, the trustee filed his petition for review of said order, a certified copy of which said petition for review is hereto attached, made part hereof, and marked Exhibit "AD."

That on the 19th day of November, 1913, said referee filed with the Clerk of said District Court his Report on said Order, a certified copy of which Report is hereto attached, made part hereof, and marked Exhibit "AE."

That on the 2d day of December, 1913, the Judge of said District Court made and filed his Memorandum Decision in said matter reversing said Order of the referee, a certified copy of which decision is hereto attached, made part hereof, and marked Exhibit "AF."

That on the 23d day of December, 1913, said District Judge made and filed his Findings of Fact and Conclusions of Law, and Judgment, in said matter, certified copies of which said Findings and Conclu-

sions, and Judgment, are hereto attached, made part hereof, and marked Exhibit "AG" and Exhibit "AH," respectively.

That thereafter and on the said 23d day of December, 1913, your petitioner filed her petition for a Rehearing on said Petition for a Review, a certified copy of which said petition for rehearing is hereto attached, made part hereof, and marked Exhibit "AI."

That on the 26th day of December, 1913, said District Judge made an order denying said petition for Rehearing, a certified copy of which said order of the District Judge is hereto attached, made part hereof, and marked Exhibit "AJ."

That said order denying said petition for a rehearing is erroneous:

1st. Because said Memorandum Decision and said Judgment, and each of them, are not supported by said Findings of Fact, in this, to wit: Such Decision and such Judgment, and each of them, are based upon the presumed findings: (a) "In the meantime claimants, as unsecured creditors, have had the right to participate in the administration of the estate and to vote as such unsecured creditors"; (b) "he (the trustee) has also paid in full a trust deed covering these together with other lands, and securing a large issue of bonds of the bankrupt company"; (c) "presumably taxes have been paid upon the lands by the trustee." And such presumed findings, namely, "(a)" and "(b)," are not contained in said Findings of Fact and Conclusions of Law, Exhibit "AG," and

are not based upon issues raised by the trustee's assignment of errors in his said petition for review, Exhibit "AD," and should not have been considered by the District Judge in passing upon said petition for review, marked Exhibit "AD."

2d. Because the mere fact of petitioner having had the right, as an unsecured creditor, to participate in the administration of estate, and to vote as such unsecured creditor, is not, in itself, sufficient to estop petitioner from filing such a substituted proof of secured debt as prayed in said petition marked Exhibit "AA."

3d. Because the payment by the trustee, of a trust deed covering these together with other lands, and securing a large issue of bonds of the bankrupt company, is not, in itself, sufficient to estop petitioner from filing such a substituted proof of secured debt as prayed in said petition marked Exhibit "AA."

4th. Because said Memorandum Decision and said Judgment, and each of them, are not supported by said Findings of Fact, nor are they supported by nor based upon the issues raised by the assignment of errors in said petition for review.

5th. Because the mere payment of taxes by the trustee, in itself, is not sufficient to estop petitioner from filing such a substituted proof of secured debt as prayed in said petition marked Exhibit "AA."

6th. Because said order of the District Judge denying said petition for rehearing prevents your petitioner from doing equity and from receiving equity, that is to say: Such order refuses to accept petitioner's offer to pay to the bankrupt estate and

the trustee all moneys, with legal interest thereon, expended by the trustee on account of taxes on the lands involved, during the administration of said estate.

That said Memorandum Decision and said Judgment, and each of them, are erroneous:

Because of the several preceding assignments of error, numbered one to five, both inclusive, which said errors are fully set forth in the particular grounds and reasons why said order of the District Judge denying said petition for rehearing is erroneous, and which are hereby referred to and assigned by reference as to the specific and particular grounds and reasons why said memorandum decision and said judgment, and each of them, are erroneous.

WHEREFORE, your petitioner, feeling aggrieved by said Memorandum Decision and said Judgment, and said order of the District Judge, and each of them, prays that the same, and each of them, may be reviewed and revised as to matters of law, and that this Court decree that said order of the District Judge, and said Judgment and said Memorandum Decision, and each of them, be vacated and held for naught, and that your petitioner be allowed to file a substituted proof of secured debt as prayed in said petition marked Exhibit "AA," and that your petitioner be given such other and additional relief as shall be proper.

JOHANNA HIRLINGER,

By FRANK LANGLEY,

Attorney for Petitioner,

Postoffice Address: Coeur d'Alene, Idaho, Otterson
Bldg.

State of Idaho,
County of Kootenai,—ss.

I, Frank Langley, being first duly sworn, on oath depose and say: That I am the attorney herein for the petitioner named in the foregoing petition, and that I make this verification in her behalf; that I am acquainted with the facts, matters and statements contained in the foregoing petition, and that the same are true to the best of my knowledge, information and belief.

FRANK LANGLEY.

Subscribed and sworn to before me this third day of January, A. D., 1913.

[Seal]

ROBERT H. MUNCEY,
Notary Public.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

**Acceptance of Service and Waiver of Notice of Filing
of Petition for Revision.**

Service of the within petition for revision is hereby accepted, and the receipt of a copy thereof including exhibits mentioned therein is hereby acknowledged, and notice of the filing of said petition is hereby waived.

Dated this third day of January, A. D. 1913.

E. N. LaVEINE,
Attorney for Samuel L. Boyd, Trustee of Bankrupt.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Johanna Hirlinger, Petitioner, vs. Samuel L. Boyd, Trustee in Bankruptcy of the Lane Lumber Co., Ltd., a Corporation, Involuntary Bankrupt, Respondent. In the Matter of the Lane Lumber Company, Limited, a Corporation, Involuntary Bankrupt. Petition for Revision. Under Section 24b of the Bankruptcy Act of Congress Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order, Judgment and Decision of the United States District Court for the District of Idaho, Northern Division.

[Names and Addresses of Attorneys.]

FRANK LANGLEY, Esq., Attorney for Johanna Hirlinger, Claimant.

Address: Coeur d'Alene, Idaho, Otterson Building.

E. N. LaVEINE, Esq., Attorney for Samuel L. Boyd, Trustee.

Address: Coeur d'Alene, Idaho, Giguere Building.

In the District Court of the United States for the District of Idaho, Northern Division.

IN BANKRUPTCY—#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Bankrupt.

Proof of Unsecured Debt of Johanna Hirlinger.

At Spokane, Washington, on the 12th day of August, A. D. 1911, came Johanna Hirlinger, of Spokane, Washington, and made oath and says, that the Lane Lumber Company, Ltd., the corporation against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of \$1,333.66. That the consideration of said debt is as follows: Purchase price W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 1, T. 49 N., R. 2 E., B. M., Shoshone Co., Idaho, paid for by one note dated June 10, 1908, due on demand for \$666.67, interest seven per cent, hereto attached and made a part hereof. One note dated June 10, 1908, due on demand for \$666.66, interest seven per cent, these given for timber claim, hereto attached and made a part hereof.

That no part of said debt has been paid except the sum of \$1,333.66; and that there are no setoffs or counterclaims to the same and that deponent has not, nor has any person by his order, or to his knowledge or belief for his use, had or received any manner of securities for said debt whatever; that no note has been given for said debt and neither has any judgment been rendered thereon, other than stated herein.

JOHANNA HIRLINGER,

Subscribed and sworn to before me this 12th day of August, A. D. 1911.

[Notary Seal]

A. W. HOVER,
Notary Public.

Endorsed]: Filed Sept. 7, 1911. L. L. Lewis, Referee. Filed December 23, 1913, A. L. Richardson, Clerk. [1*]

EXHIBITS.

\$666.66

Lane, Idaho, Jun 1, 1908.

Six Months after date without grace, we promise to pay to the order of Johanna Hirlinger, Six Hundred sixty-six & 66/100 Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of 8 per cent per annum from date until paid, for value received, Interest to be paid annually and if not so paid the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this Note. And in case suit or action is instituted to collect this Note, or any portion thereof we promise and agree to pay, in addition to the costs and disbursements provided by statute, Fifty Dollars in like Gold Coin for Attorneys fees in said suit or action.

LANE LUMBER CO., LTD.,

P. H. WALL,

Pres. & Mgr.,

M. K. WALL,

Secy.

Due Six Months.

[Endorsed]: Interest paid to June 1, 1909, \$53.33.

\$666.67

Lane, Idaho, Jun 1, 1908.

Demand, after date, without grace, we promise to

*Page-number appearing at foot of page of original certified Record.

pay to the order of Johanna Hirlinger Six Hundred sixty-six & 67/100 Dollars in Gold Coin of the United States of America, of the present standard value with interest thereon in like Gold Coin at the rate of 8 per cent per annum from date until paid, for value received, Interest to be paid annually, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this Note. And in case suit or action is instituted to collect this Note, or any portion thereof we promise and agree to pay in addition to the costs and disbursements provided by statute Fifty Dollars in like Gold Coin for Attorneys fees in said suit or action.

Due Demand.

Per P. H. WALL,
LANE LUMBER CO., LTD.,
Pres. & Mgr.
M. K. WALL,
Secy.

[Endorsed]: Interest paid to June 1, 1909, \$53.33.

[2]

**Exhibit "AA"—Petition for Leave to File
Substituted Proof of Secured Debt, by
Johanna Hirlinger.**

*In the District Court of the United States for the
District of Idaho, Northern Division.*

In the Matter of the LANE LUMBER COMPANY,
LTD., a Corporation,
Involuntary Bankrupt.

PETITION FOR LEAVE TO FILE SUBSTITUTED PROOF OF SECURED DEBT, BY
JOHANNA HIRLINGER.

To L. L. Lewis, Esquire, Referee in Bankruptcy:

Comes now Johanna Hirlinger, a creditor of the above-entitled bankrupt, before any disposal of the lands belonging to said bankrupt has been made, and respectfully represents as follows, to wit:

That on or about the first day of June, 1908, your petitioner, being then the owner of the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 1, Twp. 49 N., R. 2 E., B. M., in Shoshone County, State of Idaho, did sell and convey said premises to said bankrupt for the price of \$1,333.66, no part of which has ever been paid; that in evidence of the amount due on such price, and in consideration of said conveyance, said bankrupt then executed and delivered to your petitioner its two certain promissory notes each bearing said date, with interest at 8% per annum and for the sums of \$666.66 and \$666.67, respectively, no part of either of which notes has ever been paid.

That said premises are now a portion of the estate of said bankrupt and have never been transferred nor conveyed to any purchaser in good faith or for value, nor are they subject to any incumbrance in good faith or for value, other than petitioner's claim of lien for the amount due on said notes.

That on the 7th day of September, 1911, through ignorance, inadvertence and mistake, and without knowledge of the law and the facts, your petitioner

filed herein her claim, numbered 62, based upon said notes, as unsecured claims; but that your petitioner is legally entitled to have said debt, evidenced by said [3] notes, declared and adjudged to constitute a vendor's lien against such premises, and to be allowed and paid herein as such a secured and preferred debt. Said claim of lien is based upon sections 3441 and 3443, respectively, of the Idaho Revised Codes, and upon the National Bankruptcy Act.

That an order has been entered and filed herein directing the sale of the above-described premises together with other real property belonging to said estate; that petitioner objects to the sale of said premises under said order, or at all, until petitioner's claim of vendor's lien against said premises for the amount due on said debt is finally determined herein, for the reasons following: That, if such claim of lien is finally adjudged to be valid, petitioner desires to find a purchaser for the land affected thereby who will pay the largest possible price therefor in order that the full amount of such lien shall be recovered, and, if necessary, petitioner may become such purchaser herself, applying in payment of the purchase price, or a part thereof, the ascertained value of such lien; that until the validity of said lien is finally established petitioner cannot know whether the price received by the sale of said premises will be applied in payment of said debt, and for that reason the sale of said premises, at this time, would likely result in the same being sold for less than the amount of said debt, all of which would

be to the damage of your petitioner.

Wherefore, your petitioner prays that she be permitted to withdraw said proofs of unsecured debts, number 62, and to file herein and substitute therefor her Proof of Claim, as a secured debt, based upon the facts as above mentioned, and that such substituted proof of secured debt be declared and adjudged to be and to constitute a vendor's lien against said premises, and that such premises be ordered sold according to law and the practice of this court, and the proceeds of such sale be applied in payment of such lien, and that any deficiency, if any there shall be, after all the proceeds from such sale properly applicable thereto, have been applied [4] to the payment of such lien, shall be allowed and paid as an unsecured debt against said estate; and for such further relief as shall be proper; and for costs herein expended.

This petition is based upon the affidavit attached hereto, and upon the records and files herein, and upon the allegations set forth herein.

JOHANNA HIRLINGER,

Petitioner.

State of Idaho,

County of Kootenai.—ss.

Johanna Hirlinger, the petitioner mentioned and described in the foregoing petition, does hereby make solemn oath that the statements contained therein are true according to the best of her knowledge, information and belief.

JOHANNA HIRLINGER,

Petitioner.

Subscribed and sworn to before me this 30th day of August, 1913.

[Notary Seal]

M. A. KIGER,
Notary Public. [5]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

In the Matter of the LANE LUMBER COMPANY,
LTD., a Corporation,

Involuntary Bankrupt.

Affidavit [of Johanna Hirlinger].

State of Idaho,
County of Kootenai.—ss.

I, Johanna Hirlinger, being first duly sworn, upon oath depose and say: That on the 7th day of September, 1911, through ignorance, inadvertence and mistake, and without knowledge of the law and the facts, my claim for the sum of \$1,333.67, with interest, against the above-named bankrupt was filed in the above-entitled court, with the referee thereof, as an unsecured claim; whereas, deponent at that time was and now is legally entitled to have said sum allowed and paid herein as a secured and preferred claim against said estate.

That the facts upon which deponent claims said sum should be allowed and paid as such a secured debt are as follows, to wit:

That on or about the 1st day of June, 1911, deponent sold and conveyed to said bankrupt the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of

NE. $\frac{1}{4}$ of Sec. 1, Twp. 49 N., R. 2 E., B. M., in Shoshone County, State of Idaho, for the price of \$1,333.67, no part of which was ever paid; that the two promissory notes attached to, and upon which said proof of claim was based, were executed and delivered by said bankrupt to deponent in evidence of said price, and that the same have never been paid; that said premises have never been transferred or conveyed by said bankrupt to any purchaser in good faith or for value, nor are they now subject to any incumbrance given in good faith or for value, other than deponent's claim of lien for the amount due on said notes.

That said notes are now due and unpaid and unsecured, and have been so unsecured at all times herein mentioned, otherwise than by the personal obligation of said bankrupt and of said claim [6] of lien; that such premises belong to said bankrupt, and that I claim a vendor's lien against the same for the amount due on said notes, to wit, the sum of \$1,659.50.

JOHANNA HIRLINGER.

Subscribed and sworn to before me this 30th day of August, 1913.

[Notary Seal]

M. A. KIGER,
Notary Public.

I hereby accept service of the within Petition and Affidavit and acknowledge the receipt of copies hereof at Coeur d'Alene, Idaho, this 2d day of September, 1913.

E. N. LaVEINE,
Attorney for Trustee, Samuel L. Boyd.

[Endorsed]: Filed September 3, 1913, L. L. Lewis, Referee, Filed December 23, 1913. A. L. Richardson, Clerk. [7]

Exhibit "AB"—Objections to the Filing of Substituted Proof of Secured Debt, by Johanna Hirlinger.

In the District Court of the United States for the District of Idaho, Northern Division.

#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

OBJECTIONS TO THE FILING OF SUBSTITUTED PROOF OF SECURED DEBT, BY JOHANNA HIRLINGER.

Now comes Samuel L. Boyd, trustee, through his duly appointed attorney, E. N. LaVeine, and objects to the filing of the above referred to substituted proofs of secured debt and moves to dismiss her petition for the following reasons:

I.

That said purported vendor's lien right accrued, if at all, in June, 1908, and that said petitioner has been guilty of gross negligence and laches and at this time is estopped from asserting said purported lien.

II.

That under Section 47a (1) of the Bankruptcy Act of 1898, as amended in 1910, the trustee upon his qualifications became vested with all the rights,

remedies and powers of a creditor holding a lien by legal or equitable proceedings on the land described in said petition and that he has continuously since September 27, 1911, asserted his said lien against said property, paid taxes thereon, sold it to Duval Jackson, without objections from petitioner, which sale was not resisted by petitioner.

III.

That if petitioner is permitted to file the said Substituted Proof of Secured Debt, her unsecured claim having been allowed, it will alter her position materially and will enable her to obtain an advantage over the other creditors to which, [8] on account of the bankruptcy law and her laches, she is not entitled.

That the trustee's title to said property is not subject to the alleged vendor's lien.

E. N. LaVEINE,
Attorney for Trustee.

State of Idaho,
County of Kootenai,—ss.

E. N. LaVeine, attorney for S. L. Boyd, trustee, does hereby make solemn oath that the statements contained in the foregoing objections are true according to the best of his knowledge, information and belief.

E. N. LaVEINE,
Attorney for Trustee.

Subscribed and sworn to before me this 22d day of September, 1913.

[Notary Seal]

W. F. McNAUGHTON,
Notary Public.

Received copy of foregoing this 22d day of Sept., 1913.

FRANK LANGLEY,
Attorney for J. Hirlinger.

[Endorsed]: Filed Sept. 22, 1913. L. L. Lewis, Referee. Filed Dec. 23, 1913. A. L. Richardson, Clerk. [9]

Exhibit "AC"—Order Allowing Johanna Hirlinger to File Substituted Proof of Secured Debt.

In the District Court of the United States for the District of Idaho, Northern Division.

In the Matter of the LANE LUMBER COMPANY,
LTD., a Corporation,

Involuntary Bankrupt.

ORDER ALLOWING JOHANNA HIRLINGER TO FILE SUBSTITUTED PROOF OF SECURED DEBT.

The petition herein, dated August 30, 1913, of Johanna Hirlinger, for leave to file substituted proof of secured debt, and the Trustee's Objections thereto, dated September 22, 1913, having come regularly on for hearing on the 4th day of October, 1913, Frank Langley appearing as attorney for said Johanna Hirlinger, E. N. LaVeine appearing as attorney for said Trustee, to wit, Samuel L. Boyd, whereupon said petition and objections were argued by the respective counsel and submitted to the Court for its

decision, and the Court being fully advised in the premises, now finds that said objections should be overruled and that said petition should be allowed;

WHEREFORE, IT IS HEREBY ORDERED that said Objections, and each and all of them, be, and the same are, hereby overruled;

AND IT IS FURTHER HEREBY ORDERED that said petition be, and the same is, hereby allowed and granted.

Done at Coeur d'Alene, Idaho, in said district, this 21st day of October, 1913.

LAWRENCE L. LEWIS,

Referee in Bankruptcy.

Service of the within Order is hereby accepted and the receipt of copy thereof is hereby acknowledged at Coeur d'Alene, Idaho, this 21st day of October, 1913.

E. N. LaVEINE,

Attorney for Samuel L. Boyd, Trustee.

[Endorsed]: Filed Oct. 21, 1913. L. L. Lewis, Referee. Filed Dec. 23, 1913. A. L. Richardson, Clerk. [10]

Exhibit "AD"—Petition for Review of Referee's Order, Allowing the Filing of Substituted Proof of Secured Debt by Johanna Hirlinger.

In the District Court of the United States for the District of Idaho, Northern Division.

#449.

In the Matter of the **LANE LUMBER COMPANY, LIMITED**, a Corporation,

Involuntary Bankrupt.

PETITION FOR REVIEW OF REFEREE'S
ORDER ALLOWING THE FILING OF SUB-
STITUTED PROOF OF SECURED DEBT BY
JOHANNA HIRLINGER IN THE SUM OF
\$1,333.66 AND INTEREST, IN LIEU OF
PROOF OF UNSECURED DEBT HERETO-
FORE FILED AND ALLOWED.

To Honorable Lawrence L. Lewis, Referee in Bank-
ruptcy.

Your petitioner respectfully shows.

That he is the duly, qualified and acting trustee of
the Lane Lumber Company, Limited, a Corporation,
the above-named bankrupt;

That on September 7, 1911, Johanna Hirlinger
filed her unsecured proof of debt praying for the al-
lowance of the amount claimed in said proof of debt,
to wit: \$1,333.66;

That thereafter on the 10th day of May, 1912, said
claim was allowed in the sum of \$1,552.58;

That thereafter, on September 2, 1913, said Jo-
hanna Hirlinger filed her "Petition for Leave to File
Substituted Proof of Secured Debt."

That on September 22, 1913, the trustee caused
to be filed his "objections to the filing of substituted
proof of secured debt by Johanna Hirlinger."

That thereafter on October 21, 1913, the referee
caused to be filed his "order allowing Johanna Hir-
linger to file a substituted proof of secured debt,"
said order overruled the above referred to objections
of the trustee to the filing thereof;

That said order allowing the filing of the said
proof of secured debt will grant to Johanna Hirlinger

the right to assert a vendor's lien against the property of the bankrupt described [11] in her original unsecured claim heretofore referred to, said property being the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Section 1, Twp. 49 North, Range 2 E., B. M., Shoshone County, Idaho.

That said order was and is erroneous in that:

1. That said purported vendor's lien right accrued, if at all, in June, 1908, and that said Johanna Hirlinger has been guilty of gross negligence and laches and now is estopped from asserting said purported vendor's lien;

2. That under section 47a (1) of the Bankruptcy Act of 1898, as amended in 1910, the trustee upon his qualification became vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings on the land described and that he has continuously since September 27, 1911, asserted his said lien against said property, paid taxes thereon, sold it to Duval Jackson without objections from the petitioner, which sale was not resisted by Johanna Hirlinger;

3. That the referee by allowing Johanna Hirlinger to file the said substituted proof of secured debt, her unsecured claim having been allowed, he allows her to alter her position materially and will enable her to obtain an advantage over the other creditors to which, on account of the Bankruptcy law and her laches, she is not entitled;

4. That the referee should have held that the property of the bankrupt, including the lands de-

scribed herein on which Johanna Hirlinger claims a vendor's lien, passed to the trustee on September 26, 1911, and that he thereupon became and still is vested with the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, and that the trustee's title was and is paramount to that of the vendor lien claimant and that said land is not subject to a vendor's lien; [12]

5. That the trustee's title to said property is not subject to the alleged vendor's lien, and Sections 3441 and 3443 Idaho Revised Codes do not apply as against trustees in bankruptcy;

6. That for the foregoing reasons claimant is estopped from asserting a vendor's lien, and that said referee erred in making and entering the order allowing Johanna Hirlinger to file substituted proof of secured debt; that section 47 of the Bankruptcy Act as amended in 1910 is a bar to said lien; that said order is against the law.

WHEREFORE, your petitioner feeling aggrieved because of said order prays that the same may be reviewed as provided by the Bankruptcy Act and the General Orders.

SAMUEL L. BOYD,
Trustee.

Dated November 10, 1913. [13]

State of Idaho,
County of Kootenai,—ss.

Samuel L. Boyd, the trustee mentioned and described in the foregoing petition for review, does hereby make solemn oath that the statements contained in the foregoing petition are true accord-

ing to the best of his knowledge, information and belief.

SAMUEL L. BOYD,
Trustee.

Subscribed and sworn to before me this 10th day of November, 1913.

[Notary Seal] JOSEPH B. HOGAN,
Notary Public.

E. N. LaVEINE,
Attorney for Trustee.

[Endorsed]: Filed November 10, 1913. L. L. Lewis, Referee. Filed December 23, 1913. A. L. Richardson, Clerk. [14]

Exhibit "AE"—Report of Referee.

In the District Court of the United States for the District of Idaho, Northern Division.

IN BANKRUPTCY,—No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

REPORT OF REFEREE IN BANKRUPTCY ON
AN ORDER ALLOWING THE FILING
OF SUBSTITUTED PROOF OF SECURED
DEBT BY JOHANNA HIRLINGER IN THE
SUM OF \$1,333.66, AND INTEREST, IN LIEU
OF PROOF OF UNSECURED DEBT HERE-
TOFORE FILED AND ALLOWED.

To the Honorable FRANK S. DIETRICH, District
Judge:

I, Lawrence L. Lewis, Referee in Bankruptcy, in

charge of the above-entitled proceedings, do hereby certify:

1.

That during the course of said proceedings on, to wit, the 21st day of October, 1913, an order was made and filed herein overruling the objections of the trustee to the petition of Johanna Hirlinger praying for leave to file, herein, her substituted proof of secured debt, and granting the prayer of said petition.

2.

That thereafter on, to wit, the 10th day of November, 1913, Samuel L. Boyd, trustee of the above-entitled estate, feeling aggrieved thereat, filed herein his petition for Review, which said petition was duly granted.

3.

That a full, true and correct summary of the proceedings on which said order was made is as follows, to wit: [15]

On, to wit, the 7th day of September, 1911, the proof of claim of Johanna Hirlinger for the sum of One Thousand Three Hundred Thirty-three and 66/100 (\$1333.66) Dollars, was duly filed herein; that thereafter, on, to wit, the 10th day of May, 1912, said claim came regularly on to be heard and was duly allowed (including interest) in the sum of One Thousand Five Hundred Fifty-two and 58/100 (\$1552.58) Dollars, as an unsecured claim. (See Record of Proceedings, pages 889 and 892); that thereafter on, to wit, the 2d day of September, 1913, said claimant filed herein her petition praying for

leave to file substituted proof of secured debt; that thereafter on, to wit, the 22d day of September, 1913, the objections of the trustee thereto were duly filed herein; that thereafter on, to wit, the 4th day of October, 1913, the said petition and the trustee's objections thereto came regularly on for hearing; that thereafter, authorities were submitted on the issues raised by said petition and the said objections thereto; and, after the entire matter had been taken under advisement, the said order of the 21st day of October, 1913, was duly made and filed herein, to which said order the trustee duly excepted, and submits that said order was and is erroneous in six specific particulars, which said particulars are fully set forth in his said petition for review.

THE PRECISE QUESTIONS SUBMITTED for consideration and decision are these:

1. Does the order allowing Johanna Hirlinger, the said claimant, to file a substituted proof of secured claim permit her to materially alter her position in said cause so as to give her an advantage over other creditors or any one, or at all, to which, by law, she is not entitled?

2. Is the order from which this review is taken correct in point of law?

I hand up, herewith, for the information of the Judge, the following records, files and papers, to wit:

[16]

1. Petition for review.
2. Record of proceedings, pages 889 and 892.
3. Petition for leave to file substituted claim.
4. Objections to trustee to petition.

5. Order allowing petition.

6. Proof of claim of Johanna Hirlinger.

I FURTHER CERTIFY that the above and foregoing are all the papers, records or files used or pertaining to this review.

Done at Coeur d'Alene, Idaho, in said district, this 19th day of November, A. D. 1913.

Respectfully submitted,

LAWRENCE L. LEWIS,

Referee in Bankruptcy.

[Endorsed]: Filed November 19, 1913. A. L. Richardson, Clerk. [17]

Exhibit "AF"—Decision upon Two Petitions for Review.

In the United States District Court for the District of Idaho, Northern Division.

In the Matter of the LANE LUMBER COMPANY,
a Corporation,

Bankrupt.

DECISION UPON TWO PETITIONS FOR
REVIEW, NAMELY, THOSE OF JAMES M.
BROWN AND JOHANNA HIRLINGER.

Dec. 2, 1913.

E. N. LaVEINE, Attorney for Trustee.

FRANK LANGLEY, Attorney for Claimants.

DIETRICH, District Judge:

One of the questions involved in these petitions for review is passed upon in the decision upon petitions for review in the matter of the claims of M. K. Wall, Joseph Brown and Mary Wall, this day filed.

The distinctive question is whether or not the

claimants should at this time be permitted to amend their proofs of claim, which, as originally filed, disclosed only unsecured claims. While, as held in passing upon the other petitions for review referred to, vendor's liens are established by the statutes of the state, and must therefore be recognized, being undisclosed by the records and of a secret nature, a court of equity should not indulge an overliberal discretion in assisting claimants to assert them. *Bayley vs. Greenleaf*, 5 L. Ed. 393; 7 Wheat. 46. One of the liens here claimed arises out of a sale of June 1, 1907, and the other out of a sale of June 1, 1908. Apparently neither the [18] trustee nor the creditors ever had any notice or intimation that such claims would be asserted until petitions were filed for leave to substitute proof of secured claim for proof of unsecured claim. In the one case the claim for unsecured debt was allowed on June 12, 1912, and in the other on May 10, 1912. Petitions for leave to file substituted claims were not filed until about the month of September of the current year. In the meantime the claimants, as unsecured creditors, have had the right to participate in the administration of the estate and to vote as such unsecured creditors. Presumably taxes have been paid upon the lands by the trustee, and other expenses incurred by him in looking after and protecting the land. He has also paid in full a trust deed covering these together with other lands, and securing a large issue of bonds of the bankrupt company. Upon the whole, I am inclined to the view that the assertion at this late date of secured claims cannot be permitted with-

out prejudice to other creditors, and that therefore it would be unfair and inequitable to allow them. The order of the referee allowing the substitution of secured for unsecured claims will therefore in each case be reversed.

[Endorsed]: Filed Dec. 2, 1913. A. L. Richardson, Clerk. [19]

**Exhibit "AG"—Findings of Fact and Conclusions
of Law.**

*In the District Court of the United States for the
District of Idaho, Northern Division.*

IN BANKRUPTCY—#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

**JOHANNA HIRLINGER PETITION TO FILE
PROOF OF SECURED DEBT OF \$1659.50.**

The petition of Johanna Hirlinger for leave to file substituted proof of secured debt in the sum of \$1,659.50 came on regularly before the court without a jury on petition of the trustee for review of the order made herein by the referee granting such petition to substitute; and from the facts presented by the pleadings and the records the Court finds as follows, to wit:

I.

That on June 1, 1908, Johanna Hirlinger, the claimant herein, sold and conveyed to the Lane Lumber Company, Limited, a corporation, bankrupt above named, the West half of the Northwest quarter

(W.1/2 NW.1/4), the Southeast quarter of the Northwest quarter (SE. 1/4 NW. 1/4) and the Southwest quarter of the Northeast quarter (SW. 1/4 NE. 1/4) of section one (1), Township forty-nine (49) North, Range Two (2) E., B. M., Shoshone County, State of Idaho, for the price of \$1,333.67, with interest at 8% per annum until paid; that the whole of such price and interest is now, and was on, to wit, the 20th day of June, 1911, the date of filing of the petition in bankruptcy against said Lane Lumber Company, Limited, due, unpaid and unsecured otherwise than by the personal obligation of the buyer, the said Lane Lumber Company, Ltd.

II.

That on July 29, 1911, the said Lane Lumber Company, [20] Ltd., was adjudged an involuntary bankrupt.

III.

That on September 22, 1911, Samuel L. Boyd qualified as trustee of the estate of said bankrupt, and has continued and is now acting as such trustee.

IV.

That on September 7, 1911, through ignorance, inadvertence and mistake, and without knowledge of the law, claimant filed herein her claim against said bankrupt for said price and interest, being in all the sum of \$1,659.50, as unsecured debt, and the same was thereafter, on May 10, 1912, allowed by the referee as an unsecured debt in said sum.

V.

That on September 2, 1913, claimant filed herein her petition asking leave to withdraw said proof of

unsecured debt and to substitute therefor a proof of secured debt based upon the facts hereinbefore found, claiming, under sections 3441 and 3443 Idaho Revised Codes, a vendor's lien upon said premises which are now, and which have been at all times hereinbefore mentioned subsequent to June 1, 1908, the property of the bankrupt.

VI.

That on September 22, 1913, the trustee filed objections to said petition.

VII.

That on October 21, 1913, the Honorable Lawrence L. Lewis, referee herein, made and filed an order overruling such objections and granting said petition to substitute.

VIII.

That on November 10, 1913, the trustee filed his petition for review of said order of the referee dated October 21, 1913. [21]

IX.

That on November 19, 1913, the referee filed his report with the clerk of this court, bearing upon said claim and therewith transmitted all the papers above mentioned and record of the proceedings had before the referee herein being pages 889 to 892, inclusive.

X.

That the trustee had no notice of said unpaid purchase price set forth in said petition until it was filed with the referee herein.

XI.

Taxes have been paid on the lands involved, by the trustee, and it would be unfair and inequitable at

this late date to allow claimant to assert her vendor's lien.

CONCLUSIONS OF LAW.

As a conclusion of law from the foregoing facts, the Court finds that the referee's order complained of should be reversed and that said claimant's petition to file herein and substitute for her proof of unsecured debt a proof of secured debt asserting a vendor's lien should be denied; and it is so ordered, adjudged and decreed.

Dated December 23, 1913.

FRANK S. DIETRICH,
District Judge.

Dated December 23, 1913.

O. K.—E. N. LAVEINE,
Attorney for Trustee,
FRANK LANGLEY,
Atty. for Claimant.

[Endorsed]: Filed Dec. 23, 1913, A. L. Richardson, Clerk. [22]

Exhibit "AH"—Judgment.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

IN BANKRUPTCY—No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

JOHANNA HIRLINGER PETITION TO FILE
PROOF OF SECURED DEBT OF \$1659.50.

In the above-entitled matter, the petition of the trustee in bankruptcy for review of an order of the

referee in bankruptcy allowing Johanna Hirlinger to file a substituted proof of secured debt in lieu of an unsecured debt filed and allowed, in the sum of \$1,659.50, as a lien (vendor's) upon the west half of the northwest quarter, the southwest quarter of the northeast quarter, and the southeast quarter of the northwest quarter of section 1, township 49 north, range 2 east, B. M., Shoshone County, State of Idaho, came on to be heard, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that said order of the referee be, and the same is, hereby reversed.

Dated this 23d day of December, 1913.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed December 23, 1913. A. L. Richardson, Clerk. [23]

Exhibit "AI"—Petition of Johanna Hirlinger for a Rehearing.

In the District Court of the United States for the District of Idaho, Northern Division.

IN BANKRUPTCY—#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

PETITION OF JOHANNA HIRLINGER FOR A REHEARING.

Now comes Johanna Hirlinger, by her attorney herein, Frank Langley, and respectfully petitions this Honorable Court for a rehearing upon the peti-

tion of the trustee for a review of the Referee's order allowing the filing of substituted proof of secured debt by Johanna Hirlinger in the sum of \$1,333.66 and interest, which order of the referee was reversed by memorandum decision by the District Judge dated December 2, 1913, and for grounds of rehearing respectfully states and shows:

I.

That the mere fact of the claimant having had the right, as an unsecured creditor, to participate in the administration of the estate and to vote as such unsecured creditor is not sufficient to estop her from filing a substituted proof of secured debt based upon sections 3441 and 3443 Idaho Rev. Codes and section 67 of the Bankruptcy Act as amended; nor is such a finding supported by the issues raised by the assignments of error in the trustee's petition for review of the referee's order allowing such substitution.

II.

That the payment of taxes by the trustee is not sufficient to estop claimant from filing a substituted proof of secured debt based upon said sections of the statutes. [24]

III.

That the payment, by the trustee, of a trust deed covering these together with other lands, and securing a large issue of bonds of the bankrupt company, is not sufficient to estop claimant from filing such a proof of secured debt; nor is such a finding supported by the issues raised by the assignments of error in the trustee's said petition for review.

IV.

That the decision dated December 2, 1913, refusing claimant the right to file such a proof of secured debt, is not supported by the issues raised by the assignments of error in the trustee's said petition for review.

V.

That the trustee's said petition for review was submitted to the Court, without argument, and with the trustee's express admission that the referee's said order should be affirmed in the event of the vendor lien claim of Mary Wall being allowed herein, and that such vendor lien claim was so allowed. That claimant has been at all times herein mentioned, and is now, ready and willing to repay to the trustee all moneys, with legal interest thereon, so paid by him on account of such taxes. That the trustee has paid taxes on the lands involved herein in the total sum of \$28.66 on the dates mentioned in the hereto attached certificate marked exhibit "A," and made part hereof by reference, and no more; and your petitioner hereby offers to pay into court, to reimburse the trustee and said estate for all taxes so paid, said sum of \$28.66, with legal interest thereon from the time the same was so paid until this date.

Wherefore, petitioner prays for a rehearing upon said petition of the trustee and that said decision dated December 2, 1913, be vacated, and for such other relief as may be proper.

Dated December 22d, 1913.

FRANK LANGLEY,
Attorney for Petitioner, Postoffice Address, Coeur
d'Alene, Idaho. [25]

State of Idaho,
County of Kootenai,—ss.

Frank Langley, being first duly sworn, deposes and says: That he is the attorney for Johanna Hirlinger, the petitioner in the foregoing petition; that he has prepared the attached petition and that the facts stated therein are true.

FRANK LANGLEY.

Subscribed and sworn to before me this 22d day of December, 1913.

LAWRENCE L. LEWIS.

Referee in Bankruptcy. [26]

EXHIBIT "A."

W.1/2 NW.1/4 SE.1/4 NW.1/4 and SW.1/4 NE.1/4 of
Section One (1) in Township Forty-nine (49) North,
Range Two (2) East, Boise Meridian, in Shoshone
County Idaho.

* * * * *

Assessed to the Lane Lumber Co. for year 1911,
Total tax thereon, \$23.94, paid July 5th, 1912, By
Samuel L. Boyd, Trustee of Lane Lumber Co.

* * * * *

Assessed to the Lane Lumber Co. for year 1912.
Total tax thereon, \$9.44. First installment of \$4.72
paid January 4th, 1913, by Samuel L. Boyd, Trustee
of the Lane Lumber Co.

The remaining one-half (\$4.72) of taxes for year
1912, with penalties, costs, etc., still delinquent and
unpaid, and tax sale certificate thereon has issued to
Shoshone County.

* * * * *

State of Idaho,
County of Shoshone,—ss.

I, John P. Sheehy, County Auditor in and for the County of Shoshone, State of Idaho, do hereby certify that the above is a full, true and correct statement of all taxes paid upon the above-described property between the first day of July, A. D. 1911, and the first day of October, A. D. 1913, with the dates of such payments and the names of the persons by whom made, as shown by the records of my office.

IN WITNESS whereof, I hereunto set my hand and affixed my official seal at my office in Wallace, Idaho, this 15th day of December, A. D. 1913.

[Seal]

JOHN P. SHEEHY,
County Auditor.

[Endorsed]: Certified Statement of Taxes for the Years 1911 and 1912 on W. $\frac{1}{2}$ NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ Section One (1) in Twp. (49) N. R. (2) East Boise Meridian. Shoshone County Idaho.
[27]

Due service of the within petition for rehearing is hereby accepted, and the receipt of a true copy thereof is hereby admitted, at Coeur d'Alene, Idaho, this 22d day of December, 1913, reserving the right to strike contradictory and redundant statements.

E. N. LaVEINE,
Attorney for Samuel L. Boyd, Trustee.

[Endorsed]: Filed Dec. 23, 1913. A. L. Richardson, Clerk. [28]

Exhibit "AJ"—Order Denying Petition for Rehearing.

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Tuesday, the 26th day of December, 1913. Present: HON. FRANK S. DIEDTRICH, Judge.

No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

On this day the Court ordered that the petition for rehearing on application of Johanna Hirlinger for leave to file substituted proof of secured debt be and the same is hereby denied. [29]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED a Corporation,
Involuntary Bankrupt.

Praeipie [for Certified Transcript of Record].
PRAEIPICE BY JOHANNA HIRLINGER, FOR
TRANSCRIPT OF RECORD ON JOHANNA
HIRLINGER PETITION TO FILE VEN-
DOR LIEN CLAIM IN THE SUM OF
\$1659.60.

To the Honorable A. L. Richardson, Clerk of the
United States District Court:

You are hereby respectfully requested to prepare a certified transcript of the following described papers with the date of filing thereon, in the above-entitled proceeding:

1. Johanna Hirlinger's proof of unsecured debt, for \$1333.66, with exhibits attached thereto, excluding power of attorney, filed with the referee on September 7, 1911.

2. Petition for leave to file substituted proof of secured debt, Johanna Hirlinger, excluding power of attorney, filed with the referee on September 2, 1913.

3. Objections, by trustee, to said petition for leave to file substituted proof of secured debt, filed with the referee on September 22, 1913.

4. Order of referee allowing the filing of substituted proof of secured debt, by Johanna Hirlinger, filed by the referee on October 21, 1913.

5. Petition by trustee, for review of referee's said order, filed with the referee on November 10, 1913.

6. Report of referee on his order allowing the filing of [30] the above claim, filed with the Clerk of the United States District Court on November 19, 1913.

7. Memorandum decision of the District Judge, filed December 2, 1913, reversing said order of the referee.

8. Findings of Fact and Conclusions of Law by the District Judge, filed December 23, 1913.

9. Judgment by the District Judge, filed December 23, 1913.

10. Petition for Rehearing by Johanna Hirlinger, filed December 23, 1913.

11. Order by District Judge, denying said Petition for Rehearing, filed December 26th, 1913, (or, if no such order was filed, then the clerk's docket entry by which said Petition for Rehearing was denied).

12. This praecipe, with attached stipulation, filed January 4, 1914.

Dated January 2, 1914.

FRANK LANGLEY,

Attorney for Johanna Hirlinger.

In order to facilitate the petition for revision, in this matter, it is hereby stipulated between Frank Langley, attorney for Johanna Hirlinger, claimant, and E. N. LaVeine, attorney for Samuel L. Boyd, Trustee, that the papers included in the foregoing praecipe, when certified by the clerk of this court, shall constitute the Transcript of Record on Petition for Revision to the Circuit Court of Appeals. It is expressly agreed and understood that the trustee by his stipulation herein does not waive his right to move to dismiss this proceeding on the ground that the matter involved should be presented by appeal instead of revision.

FRANK LANGLEY,

Attorney for Johanna Hirlinger, Claimant. Address: Coeur d'Alene, Idaho, Otterson Building.

E. N. LAVEINE,

Attorney for Samuel L. Boyd, Trustee. Address: Coeur d'Alene, Idaho, Giguere Building. [31]

Return to Record.

On presentation of the foregoing it is ordered by the Court that a transcript of the record, as above stipulated, be transmitted to the United States Circuit Court of Appeals, for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk. [32]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

United States of America,
State of Idaho,—ss.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the foregoing copies of Johanna Hirlinger's proof of unsecured debt, with exhibits attached thereto; Johanna Hirlinger's petition for leave to file substituted proof of secured debt; objections, by the trustee, to said petition for leave to file substituted proof of secured debt; order of referee allowing the filing of substituted proof of secured debt of Johanna Hirlinger; petition by trustee for review of referee's said order; Report of referee on his said order;

Memorandum Decision of the District Judge; Findings of Fact and Conclusions of Law by the District Judge; Judgment by the District Judge; Petition for Rehearing, by Johanna Hirlinger; Order of District Judge denying said petition for rehearing; praecipe, with attached stipulation, and each and all of them, have been by me compared with the originals, and that it is a correct transcript therefrom and of the whole of such originals as the same appears of record and on file at my office and in my custody.

And I further certify that the cost of record herein amounts to the sum of \$20.50, and that the same has been paid by the appellant.

WITNESS my hand and the seal of said District Court, affixed at Boise, Idaho, in said District this 6th day of January, 1914.

[Seal]

A. L. RICHARDSON,

Clerk. [33]

[Endorsed]: No. 2367. United States Circuit Court of Appeals for the Ninth Circuit. Johanna Hirlinger, Petitioner, vs. Samuel L. Boyd, as Trustee in Bankruptcy of the Lane Lumber Company, Limited, a Corporation, Bankrupt, Respondent. In the Matter of the Lane Lumber Company, Limited, a Corporation, Bankrupt. Petition for Revision and Transcript of Record in Support Thereof Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law,

42 *Johanna Hirlinger vs. Samuel L. Boyd.*

of a Certain Order and Judgment of the United
States District Court for the District of Idaho,
Northern Division.

Received and filed January 8, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHANNA HIRLINGER,

Petitioner.

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt,

Respondent

In the Matter of THE LANE LUMBER COM-
PANY, LIMITED, a Corporation, Bankrupt.

On Petition for Revision from the United States
District Court for the District of Idaho,
Northern Division.

Brief of Petitioner, Johanna Hirlinger, on Revision.

FRANK LANGLEY,
Coeur d'Alene, Idaho,
Attorney for Petitioner.

Filed this day of February, 1914.

.....
Clerk.

FILED

FEB 5 - 1914



United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHANNA HIRLINGER,

Petitioner.

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt,

Respondent

In the Matter of THE LANE LUMBER COM-
PANY, LIMITED, a Corporation, Bankrupt.

On Petition for Revision from the United States
District Court for the District of Idaho,
Northern Division.

Brief of Petitioner, Johanna Hirlinger, on Revision.

FRANK LANGLEY,
Coeur d'Alene, Idaho,
Attorney for Petitioner.

THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

JOHANNA HIRLINGER,

Petitioner.

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Involuntary Bankrupt,
Respondent.

In the Matter of THE LANE LUMBER COM-
PANY, LIMITED, a Corporation, Involuntary
Bankrupt.

On Petition for Revision from the United States
District Court for the District of Idaho,
Northern Division.

STATEMENT OF THE CASE.

The Petition of Johanna Hirlinger for review and revision in this case shows the following facts:

That on June 1, 1908, Johanna Hirlinger, petitioner, sold and conveyed certain lands to the Lane Lumber Company for the price of \$1,333.66, no part of which price has ever been paid, and the payment of which is unsecured otherwise than by the personal obligation of the buyer; that the Lane Lumber Company was adjudged an involuntary bankrupt on July

29, 1911; on September 7, 1911, through ignorance, inadvertance and mistake, and without knowledge of the law, Johanna Hirlinger filed her claim against the bankrupt, for said price, which was thereafter allowed as an unsecured debt on May 10, 1912; on September 2, 1913, Johanna Hirlinger filed a petition (Record pp. 10 to 16) asking leave to withdraw her proof of unsecured debt, and to substitute therefor a proof of secured debt claiming a vendor's lien upon said lands for such unpaid price; the trustee filed objections (Record pp. 16 to 18) to said petition, claiming: "That a vendor's lien can not be asserted against the title of the trustee; that the trustee had paid taxes upon the lands; and that the lien had been lost through laches in asserting it;" the Referee entered an order (Record pp. 18 to 20) overruling said objections and granting said petition for leave to substitute; from this order of the Referee the Trustee petitioned for a Review (Record pp. 19 to 23) by the District Court, claiming that the Referee erred in making said order, upon the several grounds mentioned in said objections.

This Review was heard before the Honorable Frank S. Dietrich, District Judge, who, on December 2, 1913, filed his Memorandum Decision (Record pp. 26 to 29) reversing said Order of the Referee, upon the grounds: (a) "That Johanna Hirlinger, as an un-

secured creditor, has had the right to participate in the administration of the estate, and to vote as such unsecured creditor;" (b) "he (the trustee) has also paid in full a trust deed covering these together with other lands, and securing a large issue of bonds of the bankrupt company;" (c) "presumably taxes have been paid upon the land by the trustee."

Later, on December 23, 1913, the District Judge filed his Findings of Fact (Record pp. 28 to 31) and formal Judgment (Record pp. 31 to 33) making effective said Memorandum Decision.

And on December 23, 1913, Johanna Hirlinger filed a petition in the District Court for a Rehearing (Record pp. 32 to 37) on said Order of the Referee, which petition was denied by an order entered on the minutes of the Court (Record pp. 37) on December 26, 1913.

From the foregoing Decision, and Judgment, and Order denying Petition for Rehearing, Johanna Hirlinger has petitioned this Honorable Court for Review and Revision.

ASSIGNMENTS OF ERROR.

Petitioner assigns error (Record pp. 3, 4, and 5) in said Memorandum Decision and in said Judgment as follows:

1. Because said memorandum decision, and said judgment, and each of them, are not supported by

the Findings of Fact, in this, to-wit: Such decision and such judgment, and each of them, are based upon the presumed findings: (a) "In the meantime claimants, as unsecured creditors, have had the right to participate in the administration of the estate and to vote as such unsecured creditors;" (b) "he (the trustee) has also paid in full a trust deed covering these together with other lands, and securing a large issue of bonds of the bankrupt company;" (c) "presumably taxes have been paid upon the lands by the trustee". And such presumed findings, namely, "(a)" and "(b)," are not contained in said Findings of Fact, and are not based upon issues raised by the trustee's assignments of error in his said Petition for Review, nor by the assignments of error in the trustee's said Objections, and should not have been considered by the District Judge in passing upon said Petition for Review.

2. Because the mere fact of Johanna Hirlinger having had the right, as an unsecured creditor, to participate in the administration of the estate, and to vote as such unsecured creditor, is not, in itself, sufficient to estop her from filing a substituted proof of secured debt as prayed in her said Petition therefor.

3. Because the payment by the trustee, of a trust deed covering these together with other lands,

and securing a large issue of bonds of the bankrupt company, is not, in itself, sufficient to estop claimant from filing such a substituted proof of secured debt, nor is such a finding supported by said Findings of Fact.

4. Because said Memorandum Decision and said Judgment, and each of them, are not supported by said Findings of Fact, nor are they supported by or based upon the issues raised by the trustee's said Objections, nor by the issues raised by the assignments of error in the trustee's said Petition for Review.

5. Because the mere payment of taxes by the trustee, in itself, is not sufficient to estop petitioner from being granted the relief prayed for in said petition for leave to file substituted proof of secured debt.

Petitioner, by reference to the five foregoing alleged errors, assigns the same, and each of them, as errors in said Order of the District Judge denying said Petition for Rehearing; and further assigns, as additional error in said Order of the District Judge, as follows:

6. Because said Order of the District Judge denying said Petition for Rehearing prevents your petitioner from doing equity and from receiving equity, that is to say: Such Order refuses to accept petitioner's offer to pay to the bankrupt estate and the

trustee all moneys, with legal interest thereon, expended by the trustee on account of taxes on the lands involved, during the administration of said estate.

ARGUMENT.

The facts in this case are not in dispute, and the only questions involved are questions of law. The action of the District Court is complained of for two reasons, namely: (1) In denying the petition for leave to file substituted proof of secured debt asserting a vendor's lien, and (2) in denying the Petition for Rehearing.

It must be held that, under the facts as found and conceded in this case, the right to a lien for the unpaid purchase price existed at the time of the commencement of the proceedings in bankruptcy. Such a right is established by Section 3441 of the Idaho Revised Codes, reading:

"One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer".

In passing upon lien claims based upon State laws, Bankruptcy Courts follow the law of the State where the land in controversy is situated.

Chilton vs Lyons, 67 U. S. 458; 17 L. Ed. 304.

Slide etc. Gold Mng. Co. vs. Seymour, 153 U. S. 509; 38 L. Ed. 802.

Studevaut Bank vs. Schade, 195 Fed. 188.

Bankruptcy Act of 1898, as amended, Section 67 (d).

Section 67 (d) of the Bankruptcy Act reads:

“Liens given or accepted in good faith and not in contemplation of or in fraud upon the Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act.”

It is not contended by the trustee that this lien was not given and accepted in good faith and for a present, valuable consideration, nor that the State law required the same to be recorded.

Prior to the Amendment of 1910 the trustee had not authority to attack claims based upon unrecorded liens and mortgages where the State law required such to be recorded, nor did he then possess certain other powers now his under the Act as amended.

Remington on Bankruptcy, Secs. 1207½ to 1210.

In re Economical Printing Company, 110 Fed. 514.

But section 47a of the Act, as amended in 1910, conferred upon trustees, "as to all property in the custody or coming into the custody of the bankruptcy court, all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." The purpose of the amendment relates not to the validity of liens established and recognized under the State laws, but only to the trustee's right to question claims that are defective or invalid under such laws. Section 70 of the Act fixes the the trustee's title.

In re Morris, 204 Fed. 770.

Big Four Implement Co. vs. Wright, 207 Fed. 535.

In re Stern, 208 Fed. 488.

Memorandum Decision of Judge Dietrich, case No. 2363 now pending before this court.

The rule still remains, as before, that liens created by authority of, and in compliance with, the Statutes of a State will be recognized and sustained in bankruptcy proceedings.

Sec. 67 (d) of the Bankruptcy Act.

Loveland on Bankruptcy (4th Ed), Section 372.

In re U. S. Lumber Co., 206 Fed. 236.

Unless waived or lost by laches, the right to file a substituted proof of lien claim should be recognized. In this case the original proof of claim (Record p. 8)

discloses the fact that the debt claimed represents the unpaid purchase price of the lands involved. But through ignorance, inadvertance and mistake, the claim was first filed as an unsecured debt (Par. IV., Findings of Fact, Record p. 29). There was, therefore, no waiver of lien.

Remington on Bankruptcy, section 766.

Loveland on Bankruptcy (4th Ed), sec. 345.

Collier on Bankruptcy (7th Ed), page 598.

In re Hubbard, No. 6813 Federal Cases.

In re Swift, 111 Fed 503.

In Idaho the vendor's lien can be lost, through laches, only where the property has passed into the hands of a purchaser or incumbrancer in good faith and for value; and the trustee is not such a person.

Section 3443 of the Idaho Revised Codes reads:

“The liens of vendors and purchasers of real property are valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value.”

Even though the Statutes of Idaho required vendor's liens to be placed of record, which is neither required nor provided for, the trustee's rights are inferior to the lien claimant's, because the trustee is armed only with the “rights etc. of a creditor holding a lien by legal or equitable proceedings;” and such

a creditor is not a "purchaser or incumbrancer in good faith and for value."

Dawson vs. McCarthy, 57 Pac. 816.

And, even though section 3443, Idaho Rev. Codes, supra, did not establish and limit, exclusively, the sole manner in which the vendor's lien can be lost, the defense of laches could not be maintained in this case, because, as said by this Court in the case of London & San Francisco Bank vs. Dexter Horton & Co., 126 Fed. 593, supported by authorities therein cited on page 601:

"One principle pervades all cases involving the defense of laches, however, and that is, that not only must there be a seemingly unnecessary delay on the part of the plaintiff in bringing or prosecuting his action, but that by reason of some change in the condition or relations of the property or parties occurring during the period of delay, it would be inequitable to permit the claims of plaintiff to be enforced."

Slide etc. Gold Mng. Co. vs. Seymour, 153 U. S.;
38 L. Ed. 802.

Felix vs. Patrick, 145 U. S. 317; 36 L. Ed. 719.

Bartlett vs. Ambrose, 78 Fed. 839.

Obert vs. Obert, 12 N. J. Eq. 423.

And, wherein has the delay in asserting the vendor's lien caused any prejudice to the trustee? Or, what

change in the condition or relations of the property or parties has occurred which would now make it inequitable to permit the assertion of the lien?

The Findings of Fact (Record pp. 28 to 31) fail to disclose, neither can it be successfully asserted, that Johanna Hirlinger, if now permitted to assert her lien, would have gained any advantage by reason of her delay, or that any creditor would suffer loss by reason of the claim having been first filed, through ignorance, inadvertance and mistake, and without knowledge of the law, and allowed as unsecured. And, where no one has been caused to change his position by reason of the filing of proof of unsecured debt, the same may be withdrawn and proof of secured debt substituted.

Remington on Banruptcy, section 766.

In re Friedman, 1 A. B. R. 510.

In re Wilder, 101 Fed. 104.

In re Strickland, 167 Fed. 867.

Hutchinson vs Otis, Wilcox & Co., 190 U. S. 552;
47 L. Ed. 1179.

The decision and the Judgment of the District Court (Record pp. 26 to 29, and pp. 31 to 33, respectively), are based upon the following grounds: (a) "In the meantime claimants, as unsecured creditors, have had the right to participate in the administration of the estate and to vote as such unsecured cred-

itors;" (b) "he (the trustee) has also paid in full a trust deed covering these together with other lands, and securing a large issue of bonds of the bankrupt company;" (c) "presumably taxes have been paid upon the lands by the trustee." Johanna Hirlinger complains that the first two grounds stated, namely, (a) and (b), are not contained in the issues raised by the trustee's objections (Record pp. 16 to 18); nor in the issues raised by the trustee's assignment of errors in his petition for Review (Record pp 19 to 23), and were not before the court for consideration, and should not have been considered by the Court. The Memorandum Decision and the Judgment are each fatally defective because they are not based upon the pleadings.

Crocket vs. Lee, 7 Wheat. 522; 5 L. Ed. 513.

Carneal vs. Banks, 23 U. S. (10 Wheat); 6 L. Ed. 297.

Reynolds vs. Stockton 3 Am. St. Rep. 305.

Jones vs. Davenport, 17 Atl. 570.

And in the case of Backman vs. Sepulveda, 39 Cal. 688, the court said:

"A judgment that is not supported by the pleadings is as fatally defective as one which is not sustained by the verdict or findings. The judgment must accord with, and be warranted by, the pleadings of the party in whose favor it is

rendered."

The right to participate in the election of a trustee and in the administration of the bankrupt estate, or even such actual participation and the receipt of dividends, as an unsecured creditor, if no creditor has been caused to change his position, is no objection to the filing of a substituted proof of secured debt.

Loveland on Bankruptcy (4th Ed), section 346.

In re McConnell, No. 8712 Federal Cases.

In re Parkes, No. 10754 Federal Cases.

Nor does the mere payment of taxes on the lands involved, by the trustee, make him a "purchaser or incumbrancer in good faith and for value" in contemplation of section 3443, Idaho Rev. Codes, *supra*. If the payment of taxes should be held sufficient to defeat the vendor's lien, the very purpose of the vendor's lien Statute of the State would be avoided, because every purchaser of lands is presumed to pay the taxes as they fall due. In this case there is no finding as to the amount of taxes paid by the trustee, and, unless it affirmatively appears from the record that the estate will be substantially injured by the delay in asserting the vendor's lien, the same should be permitted to be filed; and it nowhere so affirmatively appears. Such payment of taxes might entitle the trustee to an equitable lien on the lands involved, for

the taxes paid; but such a condition would not make it inequitable to allow the vendor's lien subject to the trustee's lien for taxes paid, if the amount so paid had been proven by the trustee.

London & San Francisco Bank vs. Dexter Horton & Co., 126 Fed. 593, at page 607 (C. C. A., 9th Circuit, *supra*).

Courts of equity look upon vendor's liens as creatures of the highest equity. In *Baum vs. Grigsby*, 21 Cal. 172, 176, the Court says:

"It (the lien) does not arise from any agreement of the parties, but is the creature of equity, and is established solely for the security of the vendor. It is founded upon the natural justice of allowing a party to reach the property which he has transferred to satisfy the debt which constitutes the consideration of the transfer."

In *Redfeld vs. Woodfolk*, 63 U. S. 22 How. 318; 16 L. Ed. 370, the Court says: "A court of Chancery regards the transfer of real property in a contract of sale and the payment of the price as correlative obligations. The one is the consideration of the other; and the one failing leaves the other without a cause."

The order of the District Judge denying the Petition for Rehearing (Record p. 37) is erroneous for the several reasons hereinbefore urged against the validity of said Decision and said Judgment; and for

the further reason: That, at the time of the rendition of such Decision, petitioner had never been advised of the amount of taxes paid by the trustee, and in such Petition for Rehearing (Record p. 34) the offer is made to reimburse the trustee for all taxes paid on the lands involved, with interest. The trustee can not now say that the estate, after having been reimbursed for all taxes paid, will in any way be prejudiced by the delay in asserting the lien claim. And it was not necessary for the claimant to make such an offer, for the vendor's lien might properly be allowed subject to the trustee's equitable lien for taxes paid. Bankruptcy proceedings are continuous proceedings; there are no terms in Bankruptcy Courts.

Bankruptcy Act of 1898, as amended, section 2.

Sandusky vs. National Bank, 90 U. S. 289; 23 L. Ed. 155.

In view of the vendor's lien Statutes of Idaho, *supra*, and of Section 67(d) of the Act, and of the equitable nature of proceedings in bankruptcy, and of the relief asked, I respectfully submit that the memorandum decision, the judgment, and the order of the Honorable District Judge and each of them, are erroneous, and should be reversed; and, that a decree should be entered herein granting to Johanna Hirlinger the right to withdraw her proof of unsecured debt

and to file and substitute therefor a proof of secured debt based upon her claim of vendor's lien as aforesaid.

Respectfully submitted,
FRANK LANGLEY,
Attorney for Petitioner,
Coeur d'Alene Idaho.

Service of the foregoing Brief of Johanna Hirlinger, petitioner, is hereby accepted, by the receipt of a copy thereof, this 28th day of Jan.
..... A. D., 1914.

E. H. LaRue
.....
Attorney for Trustee.

copy.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHANNA HIRLINGER, Petitioner,

v.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt, Respondent.

In the Matter of THE LANE LUMBER COMPANY, LIMITED, a Corporation, Bankrupt.

On Petition for Revision from the United States
District Court for the District of Idaho,
Northern Division.

Brief of Respondent, Samuel L. Boyd, Trustee.

E. N. LAVEINE,
Attorney for Respondent,
Samuel L. Boyd, Trustee,
Coeur d'Alene, Idaho.

JOHN H. WOURMS,
Amicus Curiae,
Wallace, Idaho.

Filed this.....day of February, 1914.

.....
Clerk.

FILED

FEB 6 - 1914

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHANNA HIRLINGER, Petitioner,

v.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt, Respondent.

In the Matter of THE LANE LUMBER COMPANY,
LIMITED, a Corporation, Bankrupt.

On Petition for Revision from the United States
District Court for the District of Idaho,
Northern Division.

Brief of Respondent, Samuel L. Boyd, Trustee.

E. N. LAVEINE,
Attorney for Respondent,
Samuel L. Boyd, Trustee,
Coeur d'Alene, Idaho.

JOHN H. WOURMS,
Amicus Curiae,
Wallace, Idaho.

THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

JOHANNA HIRLINGER.

Petitioner,

V.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt,

Respondent.

In the Matter of THE LANE LUMBER COMPANY, LIMITED, a Corporation, Bankrupt.

On Petition for Revision from the United States
District Court for the District of Idaho,
Northern Division.

STATEMENT OF THE CASE.

Johanna Hirlinger on the 12th day of August, 1911, before the first meeting of creditors of the bankrupt, verified her proof of claim (Trans. p. 8) and filed the same with the referee on September 7, 1911, (Trans. p. 9).

During the proceedings had in this estate, which has been in course of administration for two and one-half years, the petitioner participated at all times as an unsecured creditor and not until September 3, 1913, over two years after adjudication, did petitioner file her petition for leave to file substituted proof of secured debt. (Trans. p. 16).

It will be observed that the notes on which the un-

secured and the secured claims are based were executed on June 1st, 1908. (Trans. p. 9).

Objections were filed by the trustee, (Trans. p. 16) which were overruled by the referee who granted the prayer of the petitioner allowing the substitution of a vendor lien claim for the unsecured debt, which was allowed by the court on May 10, 1913. (Trans. p. 29).

On petition, by the trustee, the referee's order was reviewed before the District Judge, (Trans. p. 19) who on December 2, 1913, reversed the referee and denied the petitioner the right to file a vendor lien claim in lieu of her allowed unsecured proof of debt filed two years prior to the filing of the petition aforesaid. (Trans. p. 28).

ARGUMENT.

The petitioner's assignments of error seeking to limit the authority of the District Judge, are not well taken and are disposed of by respondent in his brief, pages 7 and 8, in cases §2336.

The petitioner seems to be laboring under the impression that she has cured the estoppel due to her laches by reciting in her petition for rehearing before the District Judge (Trans. pp. 32-35), that she offers to pay into court the taxes paid and legal interest thereon which have been paid by the trustee. It was her duty to make the tender to the trustee either

in lawful money or in writing. Unless this is done the matter could not be compromised by the trustee. under the mandate of Section 58a. (7).

It will be observed that in the memorandum decision of the District Judge (Trans. p. 27), the court referred to the case of Bayley v. Greenleaf, referred to and elaborated upon by appellant in case §2363.

It is a fact that the claimant, as an unsecured creditor, had a right to and did participate in the administration of the estate and had the right to and did vote as an unsecured creditor.

It is also true that taxes were paid upon the land by the trustee and other expenses were incurred by him in looking after and protecting the land in controversy. (Trans. p. 30).

It is also true that he has paid in full a trust deed covering this, together with other lands, which secured a large issue of bonds of the bankrupt company on the land sought to be impressed with a vendor's lien by the petitioner. (Trans. p. 27).

Practically all of the claims of unsecured creditors, aggregating several hundreds of thousands of dollars, have been allowed by the court.

The trustee takes the position that on account of the gross negligence and laches of the petitioner that she was and is estopped from asserting her lien sought to be impressed upon a portion of the proper-

ty of the bankrupt and that under Section 47a the trustee has been vested with a lien paramount to that which the petitioner would acquire were she permitted to file her proof of secured debt and that if her petition be granted it will alter her position materially and will enable her to obtain an advantage over the other creditors to which, on account of her negligence and laches, she is not entitled.

The applied for change of status is not based on newly discovered evidence. The statutory lien is presumed to have been known to claimant and the application for change from an unsecured to a secured claim should have been made within one year after the adjudication in bankruptcy.

There has been such laches that the court would be very unjust to the creditors and to the trustee should it permit the substitution of the secured for the unsecured claim.

There is no pretense of fraud, concealment, surprise or newly discovered evidence.

There should be a reasonably speedy disposition of bankruptcy matters and no such precedent, as this would be, should be established.

The object of the year limitation, Sec. 57n Bankruptcy Act, is to enable dispatch in administration.

Remington on Bankruptcy, Sec. 718, Vol. 1, p. 434.

"Section 57n is an absolute termination of the court's power to allow claims that are presented after the expiration of one year."

Remington on Bankruptcy, Sec. 723, Vol. 1, 436.

In re Peck 168 F. 48, C. C. A. 2nd Circuit.

"A proof of claim cannot be amended after the year period by the addition of a new or different demand."

Loveland on Bankruptcy, 4th addition, Sec. 333, Vol. 1, p. 688.

In re T. A. McIntyre & Co. 176 F. 552, C. C. A. 2nd Circuit.

In re Ingalls Bros., 137 F. 517, C. C. A. 2nd Circuit.

In re Hawk, 114 F. 916, C. C. A. 8th Circuit.

In re Kessler et al., 184 F. 51, C. C. A. 2nd Circuit, is a late case holding amendments may be made after the expiration of a year after adjudication, provided applicant is neither negligent nor guilty of laches for not moving to amend until the year has elapsed.

There is no showing by petitioner, Johanna Hirlinger, which would overcome her negligence and laches. The statement in her petition for leave to file a substituted proof of secured debt (Trans. p. 11) that "through ignorance, inadvertance and mistake,

and without knowledge of the law and the facts" is not sufficient to bring her within the class to which the courts, in some instances, have granted relief.

In re Ives 113 F. 911, C. C. A. 6th Circuit.

Respectfully submitted.

E. N. LAVEINE,
Attorney for Respondent, Trustee,
Coeur d'Alene, Idaho.
JOHN H. WOURMS,
Amicus Curiae,
Wallace, Idaho.

A copy of the foregoing brief received this.....
day of Feb. 1914, at Coeur d'Alene Idaho.

Attorney for Petitioner.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHANNA HIRLINGER,

Petitioner,

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
ED, a Corporation, Bankrupt,

Respondent.

In the Matter of THE LANE LUMBER COM-
PANY, LIMITED, a Corporation, Bankrupt.

On Petition for Revision from the United States
District Court for the District of Idaho,
Northern Division.

Reply Brief of Petitioner, Johanna Hirlinger, on Revision.

FRANK LANGLEY,

Attorney for Petitioner,
Coeur d'Alene, Idaho,

Filed this.....day of February, 1914.

FILED

Clerk.

FEB 16 1914

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHANNA HIRLINGER,

Petitioner,

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt,

Respondent.

In the Matter of THE LANE LUMBER COMPANY,
LIMITED, a Corporation, Bankrupt.

On Petition for Revision from the United States
District Court for the District of Idaho,
Northern Division.

Reply Brief of Petitioner, Johanna Hirlinger, on Revision.

FRANK LANGLEY,
Attorney for Petitioner,
Coeur d'Alene, Idaho,

THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

JOHANNA HIRLINGER,

Petitioner,

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
ED, a Corporation, Involuntary Bankrupt,
Respondent.

In the Matter of THE LANE LUMBER COM-
PANY, LIMITED, a Corporation, Involuntary
Bankrupt.

On Petition for Revision from the United States
District Court for the District of Idaho,
Northern Division.

Counsel for the Respondent persists in stating alleged facts without reference to the record, and which are not found in the record. Referring to the argument on page 4 of Respondent's brief: It is not in the record that Johanna Hirlinger participated in the administration of the bankrupt estate, nor that she voted as an unsecured creditor; and it is immaterial whether she did so or not, for she gained no advantage thereby and the other creditors have not

been prejudiced in consequence of it. In Loveland on Bankruptcy. (4th Ed.), sec. 346, it is said:

“The simple fact that he (the creditor) participated in the election of the trustee, when there is no evidence that he gained any advantage thereby, or that the other creditors have been in anywise prejudiced in consequence of it, or that he was influenced by any fraudulent intent, will not preclude a claimant from making his proof of debt.

In re McConnell, No. 8712 Federal Cases.

Nor is there anything in the record in this case as to what claims of unsecured creditors have been allowed by the Court, and such a question is immaterial and irrelevant to the issues herein.

It is true that in the Memorandum Decision of the District Judge (Record p. 27) it is said that the trustee has paid in full a trust deed covering these together with other lands, but such question was not in issue before the District Court, and could not properly be considered by the Court. This question, with authorities, is fully discussed in petitioner's brief at pages 13 and 14.

Claimant is not seeking a compromise as contemplated by Section 58a (7) of the Bankruptcy Act. She is seeking recognition of her right to file a substituted proof of secured debt established by the State law; and it was not necessary that she accompany her offer to repay to the trustee any moneys ex-

pended for taxes, by an actual tender of the cash. It was not even necessary to make the offer. If it is found that the trustee is entitled to a return of the tax money, the claimant's vendor's lien may properly be allowed subject to the trustee's lien for taxes or any other moneys expended by him on account of the lands involved.

London & San Francisco Bank v. Dexter Horton & Co. 126 Fed. 593, 607 (C. C. A. 9th Cir.).

The only real issues raised by the Respondent's Brief are these:

FIRST: Can a proof of claim be amended, in any event, after the expiration of one year subsequent to the adjudication of bankruptcy?

SECOND: Can a claim, filed, through ignorance, inadvertance and mistake, as an unsecured debt and allowed as such, be withdrawn and a proof of secured debt substituted therefor after the expiration of one year from the date of adjudication?

On the first question the law is clear that a claim may be amended after the expiration of a year from the date of adjudication. All that is required is that a provable debt shall have been filed within the year.

Remington on Bankruptcy, Secs. 622, 734 and 735.

Loveland on Bankruptcy, (4th Ed.), Sec. 333.

Collier on Bankruptcy, 1909, page 615 (d).

Where the original claim was filed within the year, an amended claim based thereon may be filed after the expiration of the year. The amendment may allege the facts to make a different case, but the facts must be substantially the same.

Remington on Bankruptcy, Secs. 619 and 622.

On the second question the answer, we think, must also be in the affirmative. It is not permissible that a new debt may be filed after the expiration of the year, but an amended proof of claim based upon the original debt and asking for a different relief should be permitted to be filed. Claimant is not asserting a new claim.

In re Ashland Steel Co., (C. C. A. 6th Cir.), 168 Fed. 679.

In re Robinson, 136 Fed. 994.

In this case the original proof of debt (Record p. 8) is based upon two promissory notes, the consideration of which is therein alleged to be as follows: "Purchase price $W\frac{1}{2} NW\frac{1}{4}$ and $SE\frac{1}{4} NW\frac{1}{4} SW\frac{1}{4} NE\frac{1}{4}$, Sec. 1, T. 49 N., R. 2 E. B. M., Shoshone County, Idaho". But through ignorance, inadvertance and mistake, and without knowledge of the law, claimant filed her claim for said price and interest as an unsecured debt (Record p. 29). The above described premises are the premises against which the

claimant now asks permission to assert her vendor's lien given by Section 3441 and 3443 of the Idaho Revised Codes. No conveyance of the property has been made, and no dividends have been declared. In *Loveland on Bankruptcy*, (4th Ed.), Sec. 345, it is said:

"A proof of debt, made under a mistake of fact or law, may be withdrawn, if no action has been based upon such proof which can not be recalled or compensated."

In *re Faulkner*, (C. C. A. 8th Cir.), 161 Fed. 900.

A creditor may withdraw the proof of his claim as unsecured and may substitute therefor one as secured;

Remington on Bankruptcy, Sec. 765.

In *re Friedman*, 1 A. B. R. 510.

In *re Strickland*, 167 Fed. 867.

and he may withdraw his proof of unsecured debt and substitute therefor a proof of secured debt after the expiration of the year.

Bennett v. American Cr. Indemnity Co., 159 Fed. 624.

Even though dividends have been declared, an amendment will be permitted upon condition of the return of the dividends.

In *re Baxter*, 12 Fed. 72.

The cases of *In re Peck*, 168 Fed. 48; and *In re McIntyre Co.*, 176 Fed. 552, cited in Respondent's

brief at page 6, were cases where leave to file *original claims* after the expiration of the year was asked, and denied. The case of *In re Hawk*, 114 Fed. 916, cited in respondent's brief at page 6, was a case where the bankrupt was denied leave to amend his Schedules by the addition of a new claim more than one year after having been adjudged a bankrupt. In *Loveland on Bankruptcy*, (4th Ed.), Sec. 333, cited in respondent's brief at page 6, it is said: "An amendment may be allowed after the year period to assert a priority under a state statute." Therefore, none of the foregoing authorities, cited by respondent, supports the contention for which it is cited.

Respectfully submitted,

FRANK LANGLEY,

Attorney for Petitioner,

Address: Coeur d'Alene, Idaho.

Copy of foregoing brief received this 13th day
of February, 1914.

E. N. LaVeine

Attorney for Respondent

Copy

15
No. 2368

United States
Circuit Court of Appeals

For the Ninth Circuit.

STOCKGROWERS' STATE BANK OF MOUNTAINHOME, a Corporation, and THE FIRST NATIONAL BANK OF MOUNTAINHOME, a Corporation,
Appellants,

vs.

CHARLES E CORKER, Trustee of the Estate of THOMAS TRATHEN, a Bankrupt,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.

FILED
FEB 25 1914

United States
Circuit Court of Appeals

For the Ninth Circuit.

STOCKGROWERS' STATE BANK OF MOUNTAINHOME, a Corporation, and THE FIRST NATIONAL BANK OF MOUNTAINHOME, a Corporation,
Appellants,
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Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the
District of Idaho, Southern Division.*

IN EQUITY—No. —.

CHARLES E. CORKER, Trustee of the Estate of
THOMAS TRATHEN, a Bankrupt,
Plaintiff,

vs.

STOCKGROWERS' STATE BANK OF MOUN-
TAINHOME and THE FIRST NA-
TIONAL BANK OF MOUNTAINHOME,
Defendants.

Complaint.

To the Hon. FRANK S. DIETRICH, Judge of the
United States Court for the District of Idaho,
Southern Division.

Charles E. Corker, a citizen of the State of Idaho
and resident of Mountainhome in the County of
Elmore, State of Idaho, and Trustee of the Estate
of Thomas Trathen, a bankrupt, brings this, his bill,
against the Stockgrowers' State Bank of Mountain-
home, a banking corporation which now is and dur-

ing all the times hereinafter mentioned has been duly organized and existing under and by virtue of the laws of the State of Idaho and engaged in the banking business at Mountainhome, Idaho, and against the First National Bank of Mountainhome, a banking corporation which now is and during all the times hereinafter mentioned has been duly organized and existing under and in accordance with the banking laws of the United States and engaged in the banking business at Mountainhome, Idaho, Elmore County, State of Idaho, and for cause of action plaintiff states: [1*]

I.

That this suit is brought for the purpose of avoiding an alleged fraudulent transfer of property by the bankrupt Thomas Trathen, to the defendant the Stockgrowers' State Bank and to recover the said property so transferred or its value from the defendants, the Stockgrowers' State Bank and the First National Bank of Mountainhome.

II.

That one Thomas Trathen was adjudged a bankrupt in this Court on the 23d day of October, 1911, and that your petitioner was thereafter, to wit, on the 18th day of November, 1911, duly appointed and qualified as Trustee of the Estate of Thomas Trathen in Bankruptcy, and ever since has been and now is the duly qualified and acting Trustee of said estate.

III.

That on and for several years prior to the 23d day

*Page number appearing at foot of page of original certified Record.

of October, 1911, the date when said Thomas Trathen was adjudged a bankrupt, he, the said Thomas Trathen, was engaged in the furniture at Mountainhome, Idaho, and was the owner of a stock of furniture and fixtures and notes and book accounts of the value of about Three Thousand Dollars (\$3,000.00), and that prior to the 13th day of July, 1911, was doing his banking business as was necessary in connection with the said furniture business with the defendant the First National Bank of Mountainhome, and on said 13th day of July, 1911, the said Thomas Trathen then being insolvent was indebted to the said First National Bank of Mountainhome for money loaned on his promissory note and on overdraft, as your petitioner is informed and believes and on such information and belief states the fact to be, in the sum of about Two Thousand Dollars (\$2,000.00).

IV.

That your petitioner is informed and believes and on [2] such information and belief alleges the fact to be that the officers and directors and stockholders of the defendant, the First National Bank of Mountainhome and the officers and directors and stockholders of the defendant the Stockgrowers' State Bank were on the 13th day of July, 1911, in a large part the same and identical persons, and that the officers and directors of both of said banks on said date well knew that said Thomas Trathen was insolvent and unable to meet his obligations, and on the said date the officers and directors of both of the said defendant banks, designing and intending

to secure and obtain for the First National Bank of Mountainhome a preference over other creditors of the said Thomas Trathen, and in fraud of the bankruptcy act of the United States and in violation of the rights of other creditors of the said Thomas Trathen, did then and there collusively and fraudulently plan and arrange and agree with each other and with the said Thomas Trathen that the account of the said Thomas Trathen then due and owing to the First National Bank of Mountainhome should be ostensibly transferred from the First National Bank of Mountainhome to the Stockgrowers' State Bank and that said Stockgrowers' State Bank should make a pretended loan to the said Thomas Trathen and secure from the said Thomas Trathen a chattel mortgage on his stock of furniture and notes and accounts.

V.

That in accordance with the agreement collusively and fraudulently made as aforesaid by and between the officers and directors of the First National Bank of Mountainhome and the Stockgrowers' State Bank and the said Thomas Trathen, the said Thomas Trathen did then and there on the 13th day of July, 1911 and wholly without any consideration therefor, execute and deliver his pretended note to the Stockgrowers' State Bank for the sum of Three Thousand One Hundred Forty-seven and Eighty-four [3] Hundredths Dollars (\$3147.84), and on said date the said Thomas Trathen purporting to secure the aforesaid mortgage executed and delivered to the said Stockgrowers' State Bank a pre-

tended mortgage on the stock of furniture and notes and book accounts at Mountainhome, Idaho, then and there belonging to the said Thomas Trathen.

VI.

That said pretended note and mortgage were executed and delivered by the said Thomas Trathen at the special instance and request of the officers and directors of the First National Bank of Mountainhome, Idaho, who was then a creditor of the said bankrupt as aforesaid and within four (4) months of the filing of the petition and adjudication in bankruptcy of the said Thomas Trathen, and that said pretended note and mortgage were executed in fraud on the bankruptcy act of the United States and with the intention of creating a preference to the First National Bank of Mountainhome and the effect of such transfer was to enable the First National Bank of Mountainhome to secure a settlement in full of its account against said Thomas Trathen and to obtain a greater percentage of its debts over that of other creditors of the said Thomas Trathen.

VII.

That thereafter, to wit, on the — day of —, 1911, the defendant, the Stockgrowers' State Bank, acting under and in accordance with the provisions of the aforesaid pretended chattel mortgage which was made on the 13th day of July, 1911, proceeded to foreclose the said pretended mortgage and thereafter caused the stock of furniture and the notes and accounts then belonging to the said

Thomas Trathen to be sold at sheriff's sale in pretended satisfaction of said alleged mortgage and the said Stockgrowers' State Bank bid in and pretended to purchase at said sheriff's sale said stock of furniture and notes and accounts then belonging to the said Thomas Trathen [4] and applied the same on their unlawful purported indebtedness against the said Thomas Trathen.

VIII.

That the stock of furniture aforesaid and notes and accounts constituted the entire assets of the said Thomas Trathen at the time that he was adjudicated a bankrupt as aforesaid and that the said defendants have failed and refused to turn over to your petitioner the said furniture, book accounts and notes and have not turned over the same nor accounted for the value thereof.

IX.

That there are various and sundry other creditors of the said Thomas Trathen whose claims have been filed and allowed against said estate with claims amounting to the sum of about Two Thousand and no/100 (\$2,000.00) Dollars, and unless and until the aforesaid preference secured by the defendants herein is set aside, and the said furniture and notes and accounts, or the value and proceeds thereof are returned to your petitioner, there are and will be no assets belonging to said estate to apply towards the just demands of other creditors of the estate of Thomas Trathen.

X.

That your petitioner has been duly authorized by

W. H. Savidge, the duly appointed and acting Referee in Bankruptcy for said estate, to bring this action herein.

XI.

That your petitioner is informed and believes, and on such information and belief states the fact to be, that the value of said stock of furniture and notes and accounts wrongfully and unlawfully taken and possessed by the Stockgrowers' State Bank as aforesaid is and was the sum of Three Thousand Dollars (\$3000), and that said defendants still have in their possession the stock of furniture and notes and accounts and [5] still refuse to deliver and turn over the same to your petitioner.

WHEREFORE, plaintiff prays that the transfer by the said Thomas Trathen of his stock of furniture, notes and accounts to the Stockgrowers' State Bank may be avoided and that the pretended note and mortgage executed by the said Thomas Trathen to the Stockgrowers' State Bank on the 13th day of July, 1911, be declared null and void, and that the aforesaid property so transferred, or its value, be recovered from the said defendants and that plaintiff may have judgment against said defendants for the interest on the value thereof at the rate of seven per cent (7%) per annum from the 18th day of November, 1911, and that plaintiff may have and recover from the defendants his costs herein.

W. C. HOWIE,
Residing at Mountainhome, Idaho,
HARRY S. KESSLER,
Residing at Boise, Idaho,
Solicitors for Plaintiff.

United States of America,
District of Idaho,—ss.

I, Charles E. Corker, the plaintiff herein mentioned and described in the foregoing bill of complaint, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

C. E. CORKER,
Petitioner.

Subscribed and sworn to before me this 8th day of August, 1913.

[Seal]

W. C. HOWIE,
Notary Public in and for Elmore County, State of Idaho.

[Endorsed]: Filed August 9th, 1913. A. L. Richardson, Clerk. By E. B. Yarrington, Deputy.
[6]

IN EQUITY.—No. —.

CHARLES E. CORKER, Trustee of the Estate of
THOMAS TRATHEN, a Bankrupt,
Plaintiff,

vs.

STOCKGROWERS' STATE BANK OF MOUNTAINHOME and THE FIRST NATIONAL BANK OF MOUNTAINHOME,
Defendants.

Answer of First National Bank of Mountainhome.

THE ANSWER OF THE ABOVE-NAMED DEFENDANT TO THE BILL OF COMPLAINT OF THE ABOVE-NAMED PLAINTIFF:

In answer to the said Bill the defendant, the First National Bank of Mountainhome, says as follows:

I.

Admits that for several years prior to the 13th day of July, 1911, Thomas Trathen was engaged in the furniture busines at Mountainhome, Idaho, and was the owner of a stock of furniture, fixtures, notes and book accounts; admits that the said Thomas Trathen on and prior to the 13th day of July, 1911, was doing his banking business with this defendant and admits that on that date the said Thomas Tra then was indebted to it for money loaned upon his promissory note in the sum of about Twenty-three Hundred (\$2,300) Dollars; that of said sum One Thousand Seven Hundred and four and 10/100 (\$1,704.10) Dollars was secured by a mortgage upon the furniture and fixtures owned by the said Thomas Tra then, and covered all of the furniture and fixtures owned by him and in his possession on the 13th day of July, 1911, which said mortgage was executed on the 12th day of April, 1909, and filed for record in the office of the County Recorder of Elmore County, Idaho, on the 13th day of May, 1909, a copy of which mortgage is hereto attached marked Exhibit "A" [7] and made a part of this answer.

II.

That this defendant denies that the officers, di-

rectors and stockholders of this defendant and of the Stockgrowers' State Bank are the same and identical persons as set forth in paragraph IV of plaintiff's bill, but allege the fact that this defendant has five directors, only two of whom are directors of the Stockgrowers' State Bank, which bank has nine directors; denies that the officers and directors of this defendant knew that the said Thomas Trathen was insolvent and unable to meet his obligations but admits that he was behind in some of his accounts and some of his creditors were pressing him for payment, among which was this defendant, and it insisted that he make payment of his account to them; denies that the officers of this defendant and the Stockgrowers' State Bank fraudulently or collusively planned and arranged among themselves to the effect and to the end that the Stockgrowers' State Bank should make a pretended loan to the said Thomas Trathen and that it should secure from him a chattel mortgage on his stock of furniture, notes or accounts.

III.

Deny that in accordance with any agreement collusively or fraudulently made and entered into between the officers of the First National Bank and the Stockgrowers' State Bank the said Thomas Trathen on the 13th day of July, 1911, and without consideration executed and delivered to the Stockgrowers' State Bank his note for Three Thousand One Hundred Forty-seven and 84/100 (\$3,147.84) Dollars secured by a mortgage upon his stock of furniture at Mountainhome, and deny that the said note

and mortgage were collusively made and deny that they were made without consideration. [8]

IV.

Denies that the said note and mortgage was executed by the said Thomas Trathen at the special instance and request of the directors of this defendant, except as the Bank insisted upon securing payment of his obligations; denies that the said mortgage and note was given with the intention of giving this defendant a preference and allege that at that time this defendant had and owned a mortgage upon the entire stock of furniture of the said Thomas Trathen to the full value thereof, which mortgage was executed long prior to the 13th day of July, 1911, and more than four months prior thereto, Exhibit "A"; that at the time the said Thomas Trathen secured from the Stockgrowers' State Bank the said loan the directors of the said bank did not know that the said Thomas Trathen was insolvent or a bankrupt, or unable to pay his creditors and was in fact unfamiliar with his business, but the loan was made upon his representations that his stock of goods and fixtures were of a greater value than it turned out to be or actually was at that time.

V.

Admit that the Stockgrowers' State Bank foreclosed its mortgage so made and executed on the 13th day of July, 1911, on or about the 2d day of October, 1911, and caused the said furniture to be sold by the Sheriff of the County of Elmore and the same was purchased by the said Stockgrowers' State Bank and possession thereof taken on the 3d

day of October, 1911, and the proceeds thereof applied in payment of his said note and mortgage, and deny that there was any fraud in said foreclosure, but the said foreclosure was made by the said bank simply because of the failure of the said mortgagor to comply with the terms and conditions thereof.

VI.

Admits that the stock of furniture, fixtures notes and book accounts constituted practically the entire assets of [9] the said Thomas Trathen but that at the time that his petition in bankruptcy was filed the said Thomas Trathen had no right, title or interest therein whatever; that the said Stockgrowers' State Bank had possession of the stock of furniture, fixtures etc.

WHEREFORE, this defendant prays that plaintiff take nothing by this suit and for such other and further relief as good conscience may sustain and for costs of suit.

L. B. GREEN,

E. M. WOLFE,

Attorney, Residence Mountainhome, Idaho.

United States of America,

District of Idaho,—ss.

I, F. E. Austin, Cashier of the above-named defendant, do hereby make solemn oath that the statements contained herein are true and correct to the best of my information, knowledge and belief.

F. E. AUSTIN.

Subscribed and sworn to before me this 22d day of Sept., 1913.

[Seal]

RUBY MELLEN,
Notary Public. [10]

Exhibit "A" [to Answer of First National Bank of Mountainhome—Chattel Mortgage].

THIS INDENTURE, Made this 12th day of April in the year of our Lord one thousand nine hundred and nine between Thomas Trathen residing at Mountainhome, County of Elmore, State of Idaho, and by profession, trade or occupation Merchant the party of the first part, and W. D. Evans and John Owens residing at Mountainhome, County of Elmore, State of Idaho and by profession, trade or occupation Hotel-keeper and Rancher the parties of the second part.

WITNESSETH, That the said party of the first part for and in consideration of the sum of Seventeen Hundred Dollars, to him in *made* paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant bargain, sell, assign, transfer and set over, unto the said parties of the second part, all those certain goods and chattels now being in Elmore County, State of Idaho, and described as follows:

All of the furniture, carpets, music, musical instruments, picture and picture frames, draperies, window-shades, linoleums, glassware, bric-a-brac, etc., kept in that certain storeroom situated in the Bailey Siffert Garrett Company's block, Mountainhome, Idaho, known as the Trathen Furniture Store, also

all said goods and merchandise owned by the said mortgagor in transit or stored in warehouses in Mountainhome. The mortgagees having guaranteed the payment of the within note, and this mortgage is given to secure them from loss.

TO HAVE AND TO HOLD, All and singular, the said goods and chattels above bargained and sold, or intended so to be, unto the said parties of the second part, their executors, administrators and assigns forever. Provided, nevertheless, that [11] these presents are upon this express condition, that if the said party of the first part, his executors, administrators or assigns shall well and truly pay unto the said party of the second, their executors, administrators or assigns, the sum of Seventeen Hundred Dollars, according to the conditions of one certain promissory note, of which the following is a true copy:

\$1700. Mountainhome, Idaho, April 12th, 1909.

Three months after date, I, we, or either of us, promise to pay to the First National Bank of Mountainhome, Idaho, or order, Seventeen Hundred Dollars, for value received, negotiable and payable at the First National Bank, Mountainhome, Idaho, in gold coin of the United States of America, of the present standard of weight and fineness, with interest thereon from date until paid, both before and after maturity, at the rate of ten per cent per annum, payable at maturity. In case this note is collected by an Attorney, either by suit or otherwise, I, we, or either

of us, promise to pay all costs and a reasonable amount as attorney's fees.

THOMAS TRATHEN.

No.

Due.

P. O.

—as by the said promissory note, reference being thereunto had, may fully appear, then these presents shall be void. But in case default be made in the payment of said principal sum of money, or any part thereof, or interest, or any installment thereof, as provided in said note, then and from thenceforth it shall be optional with the said parties of the second part, their executors, administrators or assigns, to consider the whole of said principal and interest expressed in said note as immediately due and payable, although the time expressed in said note for the payment thereof shall not have arrived; and immediately thereupon and without notice of such election to consider the [12] whole sum to be due, it shall be lawful for, and the said party of the first part does hereby authorize and empower the said party of the second part, their executors, administrators or assigns with the aid and assistance of any person or persons, to enter the premises or such other place or places as the said goods or chattels are or may be placed and take and carry away the said goods and chattels and sell and dispose of the same for the best price they can obtain by due process of law, or by agreement of the parties to this mortgage, their executors, administrators or assigns, and out of the money arising therefrom to retain and pay the sum above

mentioned, and interest as aforesaid, and all costs and charges touching the same, together with counsel fees in such sum as the Court may adjudge reasonable, if this mortgage be foreclosed by decree of Court, or if it be foreclosed by decree and sale, then counsel fees in the sum of One Hundred and Fifty Dollars, which sum is hereby stipulated by the parties hereto as reasonable and proper counsel fees for such foreclosure, rendering the overplus, if any, unto the said party of the first part, or to his executors, administrators or assigns. And until default be made in the payment of said sum of money, the said party of the first part, his executors, administrators or assigns, may remain and continue in the quiet and peaceable possession of the said goods and chattels, and in full and free use and enjoyment of the same.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set *his hand* and seals the day and year first above written.

THOMAS TRATHEN.

Signed, sealed and delivered in the presence of:

State of Idaho,

County of Elmore,—ss. [13]

On this 12th day of April, in the year 1909, before me, Elizabeth Greenwald, a Notary Public in and for said county, personally appeared Thomas Trathen, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed my official seal the day and year
in this certificate first above written.

[Seal]

ELIZABETH GREENWALD,

Notary Public.

No. 34—9237.

CHATTEL MORTGAGE.

Trathen

to

Evans & Owens.

State of Idaho,

County of Elmore,—ss.

I hereby certify that this instrument was filed for
record at the request of H. E. Reckmeyer at 55 min-
utes past 9 o'clock A. M., this 13th day of May, 1909,
in my office, and duly recorded in Book 2 of Chattel
Mortgages at page 61.

F. C. SMITH,

Ex-officio Recorder.

By Louis E. Nicholson,

Deputy.

Fees 50¢Pd.

[Endorsed]: Filed Sept. 3, 1913. A. L. Richard-
son, Clerk. [14]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

IN EQUITY.—No. —.

CHARLES E. CORKER, Trustee of the Estate of
THOMAS TRATHEN, a Bankrupt,
Plaintiff,

vs.

STOCKGROWERS' STATE BANK OF MOUN-
TAINHOME and THE FIRST NATIONAL
BANK OF MOUNTAINHOME,
Defendants.

**Answer of the Stockgrowers' State Bank of
Mountainhome.**

THE ANSWER OF THE ABOVE-NAMED DE-
FENDANT TO THE BILL OF COMPLAINT
OF THE ABOVE-NAMED PLAINTIFF:

In answer to the said bill the defendant, the Stock-
growers' State Bank of Mountainhome, says as fol-
lows:

I.

Admit that for several years prior to the 23d day of July, 1911, Thomas Trathen was engaged in the furniture business at Mountainhome, Idaho, and was the owner of a stock of furniture, fixtures, notes and book accounts; admit that the said Thomas Trathen on and prior to the 13th day of July, 1911, was doing his banking business with the First National Bank and admits that on that date the said Thomas Trathen was indebted it for money loaned upon his promissory note in the sum of about Twenty-three

Hundred (\$2,300) Dollars; that of that sum One Thousand Seven Hundred and Four and 10/100 (\$1,704.10) Dollars was secured by a mortgage upon the furniture and fixtures owned by the said Thomas Trathen and covered all of the furniture and fixtures owned by him and in his possession on the 13th day of July, 1911, which said mortgage was executed on the 12th day of April, 1909, and filed for record in the office of the County Recorder of Elmore County, [15] Idaho, on the 13th day of May, 1909, a copy of which mortgage is hereto attached marked Exhibit "A" and made a part of this answer.

II.

That this defendant denies that the officers and directors and stockholders of the First National Bank are the same and identical persons as set forth in paragraph IV of plaintiff's bill, and allege the fact to be that this defendant bank has Nine Directors, only two (2) of whom are directors of the First National Bank, which said Bank has five (5) directors; denies that the officers and directors of this defendant knew that the said Thomas Trathen was insolvent and unable to meet his obligations, but admits that he was behind in some of his accounts and that some of his creditors were pressing him for payment, among which was the First National Bank, and it insisted that he make payment of his account to them; denies that the officers of this defendant bank and the First National Bank fraudulently or collusively planned and arranged among themselves to the effect and to the end that this defendant bank should make a pretended loan to the said Thomas

Trathen, or make any loan to the said Thomas Trathen, and that it should secure from him a chattel mortgage on his stock of furniture, notes or accounts.

III.

Denies that in accordance with any agreement collusively or fraudulently made and entered into between the officers of this defendant bank and the First National Bank, the said Thomas Trathen, on the 13th day of July, 1911, and without consideration, executed and delivered to this defendant his note for Three Thousand One Hundred and Forty-seven and 84/100 (\$3,147.84) Dollars, secured by a mortgage upon his stock of furniture at Mountainhome, and denies that the said note and mortgage were collusively made, and denies that they were made without consideration. [16]

IV.

Denies that the said note and mortgage was executed by the said Thomas Trathen at the special instance and request of the directors of the First National Bank, except as said bank insisted upon securing payment of his obligations; denies that the said note and mortgage was given with the intention of giving the First National Bank a preference and allege that said bank at that time had a mortgage upon the entire stock of furniture of the said Thomas Trathen to the full value thereof, which mortgage was executed long prior to the 13th day of July, 1911, and more than four months thereto; that at the time the said Thomas Trathen secured from this defendant the said loan the Directors of said bank did not know that the said Thomas Trathen was insolvent

or a bankrupt or unable to pay his creditors and was in fact unfamiliar with his business, but the loan was made upon his representations that his stock of goods and fixtures were of a greater value than what it turned out to be or actually was at that time.

V.

Admits that this defendant foreclosed its mortgage so made and executed on the 13th day of July, 1911, on or about the 2d day of October, 1911, and caused the said furniture to be sold by the Sheriff of Elmore County and the same was purchased by this defendant and possession thereof taken on the 3d day of October, 1911, and the proceeds of sale applied in payment of his said note and mortgage, and denies that there was any fraud in the said foreclosure, but the foreclosure was made by this defendant simply because of the failure of the said mortgagor to comply with the terms and conditions thereof.

VI.

Admits that the stock of furniture, fixtures, notes and book accounts constituted practically the entire assets of the said Thomas Trathen, but at the time that his petition in bankruptcy was filed the said Thomas Trathen had no right, title or interest therein whatever; that the said Stockgrowers' State Bank had possession of the said furniture, fixtures, etc.
[17]

VII.

FOR A FURTHER ANSWER TO THE PLAINTIFF'S BILL THE DEFENDANT, THE STOCKGROWERS' STATE BANK ALLEGES:

That the mortgage held and owned by the First

National Bank and which was executed to W. D. Evans and John Owens was a first lien upon the entire stock of furniture and fixtures owned by the said Thomas Trathen on the 13th day of July, 1911, and was in all respects superior to every claim of every creditor of the said Thomas Trathen, and that because of the loan by this defendant to the said Thomas Trathen on the 13th day of July, 1911, was discharged and satisfied of record. This defendant should be entitled to, and given the benefit of, all of the rights accruing under the said mortgage and the same should be considered and held to be the property of this defendant and to the extent that the said mortgage was a lien upon the property of the said Thomas Trathen and the mortgage executed to this defendant on the 13th day of July, 1911, should be considered as a renewal thereof.

WHEREFORE, defendant prays that the plaintiff take nothing by this suit and for such other and further relief as good conscience may sustain and for costs of suit.

T. B. GREEN.

E. M. WOLFE,

Attorney. Residence, Mountainhome, Idaho.

United States of America,

District of Idaho,—ss.

I, J. H. Whitson, cashier of the above-named defendant, do hereby make solemn oath that the statements contained herein are true and correct to the best of my knowledge, information and belief.

J. H. WHITSON.

Subscribed and sworn to before me this 3d day of September, 1913.

[Seal] ELIZABETH GREENWALD,
Notary Public Elmore Co., Idaho.

My commission expires Feb. 16, 1917.

Exhibit "A" omitted. Same as in Answer of First National Bank of Mountainhome.

[Endorsed]: Filed Sept. 4, 1913. A. L. Richardson, Clerk. [18]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

IN EQUITY—No. 449.

CHARLES E. CORKER, Trustee of the Estate of
THOMAS TRATHEN, a Bankrupt,
Plaintiff,

vs.

STOCKGROWERS' STATE BANK OF MOUNTAINHOME and THE FIRST NATIONAL
BANK OF MOUNTAINHOME,
Defendants.

Decree.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

That the transfer and mortgage made and executed by the said Thomas Trathen to the Stockgrowers' State Bank on the 13th day of July, 1913, of the stock of furniture, notes and accounts of the said Thomas

Trathen, was null and void as against the rights of other creditors of the said Thomas Trathen, and said First National Bank of Mountainhome by said transfer obtained a greater percentage of its debt against the said Thomas Trathen than other creditors of the same class; and that the sale thereof by the Sheriff of Elmore County, Idaho, under proceedings in foreclosure of said mortgage was and is null and void.

THEREFORE, it is ordered, adjudged and decreed that the plaintiff do have and recover of and from the defendants the stock of furniture owned and possessed by the said Thomas Trathen on the 13th day of July, 1911, and sold as aforesaid by the sheriff of Elmore County, on the 3d day of October, 1911, particularly described as follows, to wit: [19] 4 alarm clocks, 5 bottles of glue, large lot of miscellaneous dishes, 1 library table, 24 large lamps, 2 pedestals, 2 common lamps, 3 music cabinets, 2 writing desks and bookcase combined, 2 combination china closets and buffet, 24 bottles nulae cleanser, 21 fruit and cake plates, 6 small waste baskets, 1 small corner cabinet, 1 plate rail, 2 jardinieres, 4 vases, 1 small settee, 58 Edison records, 1 electric lamp, 1 hall tree, 24 dressers, 26 iron bedsteads, 1 piano-stool, 3 kitchen cabinet tables, 35 bedsprings, 3 washstands, 1 lot of picture frame moulding, 18 rocking-chairs, 10 pitchers and bowls, 14 chambers, 9 center stands, 1 ironing-board, 5 quilts, 4 door mats, 3 toy pianos, 1 box assorted children's toys, 4 clock stands, 18 knock-down dining-room chairs, 5 baby carriages, 13 mattresses, 9 cards carpet fringe, 4 ironing-rack stands, 58 assorted ingrain wallpaper,

3 round dining-room tables, 1 sideboard, 3 plain kitchen tables, 3 rolls carpet paper, 90 large pictures in frames, 47 dining-room chairs, 3 baby-basket chairs, 6 slop jars, 4 picture-frame easels, 9 feather dusters, 9 small mirrors, 5 pillows, 6 suitcases, 1 toy dresser, 2 toy stands, 4 cuspidors, 3 refrigerators, 5 racks assorted ingrain paper, 1 combease, 1 card upholstery cord, 7 racks table leaves, 1 child's oak chair, 6 steel spring sanitary cots, 2 clothes racks, 2 racks for furniture, 1 floor showcase, 34 pairs lace curtains, 1 small blackboard, 2 small dining-room tables, 10 rug hangers, 1 round oak heating stove, 1 ladder, 64 window-shades, 13 boxes assorted window glaze, 22 window-shade rollers, 1 small desk, 2 small rugs, 1 spool of twine, 2 footstools, 1 folding-bed, 1 cupboard, 1 bookcase, 2 pair stretchers, 1 roll matting, 4 small rolls carpet, 1 large rug, 4 small rolls linoleum, 1 truck, 4 washstand racks, 1 carpet-sweeper holder, 1 carpet-sweeper, 1 office desk, 1 baby crib, 1 large map, 1 bundle hardwood rounds for chairs, all tools, oils, fixtures, varnish, trimmings, furniture, and goods, wares and merchandise in the store of the mortgagor, situate in the Bailey-Siffert-Garrett building in Mountainhome, and in storehouse on the corner of Jackson Avenue and Bennett Street.

[20]

Also all notes and accounts then belonging to the said Thomas Trathen,

And it is further ordered, adjudged and decreed that if the said defendants do not redeliver said property above mentioned to plaintiff within 20 days from and after the filing of this decree, that plaintiff have

execution against the said defendants and each of them for the full amount thereof, to wit, the sum of Two Thousand Four Hundred Sixty-five and Eighteen Hundredths Dollars (\$2,465.18), the value thereof, together with interest thereon at the rate of seven per cent per annum from the 18th day of November, 1911, and for costs of suit hereby taxed at One Hundred Forty and 15/100 Dollars.

FRANK S. DIETRICH,

Judge of the United States Court for the District of Idaho, Southern Division.

[Endorsed]: Filed Oct. 30, 1913. A. L. Richardson, Clerk. [21]

In the District Court of the United States for the District of Idaho, Southern Division.

CHARLES E. CORKER, Trustee of the Estate of
THOMAS TRATHEN, a Bankrupt,
Plaintiff,

vs.

STOCKGROWERS' STATE BANK OF MOUNTAINHOME and THE FIRST NATIONAL BANK OF MOUNTAINHOME,
Defendants.

Statement of Evidence.

BE IT REMEMBERED, that on this 8th day of October, 1913, the above-entitled cause came regularly on for trial before the above-entitled court, whereupon the following proceedings were had.

[**Testimony of C. E. Corker, for Plaintiff.**]

C. E. CORKER, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

(Testimony of C. E. Corker.)

I live at Mountainhome, Idaho. I am the duly appointed, qualified and acting Trustee in Bankruptcy of the estate of Thomas Trathen. After my appointment as such I served written notice upon Trathen to which he made a written reply. The above were thereupon introduced in evidence as Plaintiff's Exhibits 1 and 2.

[Plaintiff's Exhibit No. 1—Notice to Thomas Trathen and Demand.]

In the District Court of the United States for the District of Idaho.

IN BANKRUPTCY.

In the Matter of THOMAS TRATHEN,

Bankrupt.

To Thomas Trathen the Above-named Bankrupt:

You are hereby notified that I have been duly appointed and have qualified as trustee in bankruptcy in the above-entitled matter, and I hereby demand of you possession of all property, books, records and all other things now in your possession to which I am entitled by virtue of such office of trustee. Please render me a full statement of your property and effects.

Dated this 14th day of December, 1911. [22]

C. E. CORKER,

Trustee of the Estate of Thomas Trathen, Bankrupt.

Served Dec. 19, 1911.

[Plaintiff's Exhibit No. 2—Reply of Thomas Trathen to Trustee.]

Mountainhome, Idaho, Dec. 29, -11.

C. E. Corker, Trustee.

I herewith submit statement of property and effects in my name, my furniture stock amounting to about \$3,000 is now in the hands of the Stockgrowers' Bank of this City. I have no other property of any value outside of my legal exemptions.

Signed—THOMAS TRATHEN,

I also made a written demand on the Stockgrowers' State Bank, of which the following is a copy:

[Notice to Stockgrowers' State Bank of Mountainhome and Demand.]

In the District Court of the United States for the District of Idaho.

IN BANKRUPTCY.

In the Matter of THOMAS TRATHEN,

Bankrupt.

To the Stockgrowers' State Bank of Mountainhome, Idaho.

You are hereby notified that I am the duly appointed, qualified and acting trustee of the estate of Thomas Trathen, a bankrupt, and I hereby demand of you immediate possession of all property and effects of every kind and description of said bankrupt now in your possession including the stock of general merchandise of said Thomas Trathen now held by

you. Please render a statement.

Dated this 14th day of December, 1911.

C. E. CORKER,

Trustee of the Estate of Thomas Trathen, a Bank-
rupt. [23]

That Bank made no written reply. At a second and third time I went in they referred me to their attorney, L. B. Green of Mountainhome. I went to see him and he stated they had the property up there storing it, waiting for somebody to raise a rough house. They refused to deliver the property to me. This was after the foreclosure sale. The demand on the Bank was after the foreclosure [39] sale. I have not been able to secure any assets from the estate of Thomas Trathen.

Witness excused.

[Testimony of J. H. Whitson, for Plaintiff.]

Whereupon J. H. WHITSON, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I reside at Mountainhome and am the Cashier of the Stockgrowers' State Bank and have been such since July, 1912. Prior to that time, I was book-keeper and Clerk in that bank for two and one-half years.

A certified copy of the chattel mortgage from Trathen to the Stockgrowers' State Bank was thereupon admitted in evidence as Plaintiff's Exhibit 4. The material parts of it are as follows:

[Plaintiff's Exhibit No. 4 (Material Parts of).]

The mortgage is dated July 13, 1911, and is given to secure the payment of a note for \$3,147.84, dated on the same day and due on demand. The note is payable to the Stockgrowers' State Bank and bears interest at the rate of ten per cent per annum. The mortgage contains the usual provisions and is duly acknowledged and sworn to and was duly filed for record on July 13, 1911, office County Recorder, Elmore County, Idaho. The following description of the property mortgaged and provision occur therein:

“All furniture, carpets, pictures, picture frames, music, musical instruments, wallpaper, glass, glassware, porcelain ware, stoves, bedding, chinaware, dishes, etc., and all other goods, wares and merchandise now in or to be kept in the store of the mortgagor situated in the Bailey-Siffert-Garrett building in Mountainhome, and in his storehouse on the corner of Jackson Avenue and Bennett Sts., in said town, and on all such furniture, goods, wares and merchandise as may be placed in said store or stock of goods from time to time during the life of this mortgage.

“The mortgagor may continue in possession of this property [40] and sell and dispose of the same in the regular retail way, but for cash, and he must account every day for the proceeds of the sales, which proceeds must be applied upon this mortgage. A failure to so account to the mortgagee will authorize it to consider the claim due and to take possession of the property covered by this mortgage and to sell and dispose of the same. At any time that the mort-

(Testimony of J. H. Whitson.)

gagee herein or the cashier thereof may feel unsafe in the security, or if for any cause he deems it advisable, the said mortgagee may immediately take possession of the property covered by this mortgage and may sell and dispose of the same as herein otherwise provided."

The witness continuing: I have charge of the books of account and records of the Bank. On July 13, 1911, F. P. Ake was President, R. W. Smith, Vice-president, Worth S. Lee, Cashier, and the directors were the above-named officers together with Will T. Montgomery, R. P. Chattin, A. M. Hall, J. M. Cowen and W. H. Blackman.

The records of the bank show that it paid out \$2,294.35 on the Trathen note. The face of which note is for \$3,147.84. The \$2,294.35 was paid to the First National Bank at Mountainhome.

I had nothing to do with the negotiations or making of the loan. L. B. Green was the bank's attorney at that time. As to whether Mr. Trathen had done any business with the Stockgrowers' Bank prior to his giving the note and mortgage I believe I have seen his name on our books. This was several years before. I know G. A. Herder, who is operating as *Thompson Furniture* at Mountainhome. He had an account at our bank up to about the time the mortgage was given by Trathen. His account was closed August 5, 1911. He was indebted to the bank about \$3,400.00 at that time. It was all paid August 5, 1911. My impression is that Mr. Lee told me this money came from the First National Bank at Mountainhome. Neither Herder nor the Thomp-

(Testimony of J. H. Whitson.)

son Furniture Company have done any business at our bank since August 5, 1911. On July 13, 1911, the Thompson Furniture Company had a note and an open account at the Stockgrowers' Bank. The note was for \$3,400.00 and the open account was for \$169.39. Mr. Herder is still in the same business at Mountainhome, conducting it under the name of the Thompson Mercantile Company.

[Testimony of F. E. Austin, for Plaintiff.]

Whereupon F. E. AUSTIN, a witness on behalf of plaintiff, being first duly sworn, testified as follows: [24]

I live at Mountainhome. I am the Cashier of the First National Bank, and have held that position for a trifle over three and half years last past. The officers of the First National Bank on July 13, 1911, were R. P. Chattin, President; Arthur Pence, Vice-president; F. E. Austin, Cashier; Will T. Montgomery, Assistant Cashier. The directors were Messrs. Chattin, Montgomery, Hein, Pence and Blunk. R. W. Smith was a stockholder but not an officer. On July 13, 1911, Trathen owed two notes at the Bank, one for \$1700.00 and one for \$500.00, with some accrued interest. Our records show these notes were paid on August 5, 1911, the money coming from the Stockgrowers' State Bank. Trathen's account with us was closed on October 9, 1912. He kept banking with us right along after this account was closed up until that time. I had nothing to do with Herder's loan. Green was the bank's attorney at the time. My recollection is that we loaned Herder \$3,606.69, the money being paid to Mr. Lee, the Cashier of the

(Testimony of F. E. Austin.)

Stockgrowers' State Bank. I know nothing about the circumstances of the negotiations of this loan and the securing of money from the Stockgrowers' State Bank to pay the Trathen account. Herder did not speak to me about getting the loan.

Cross-examination.

It is the custom of the banks at Mountainhome to carry merchants in a general way. It was my impression the Trathen loan was sufficient to ease him over with his creditors and to enable him to get in better shape. The \$1700.00 note was secured by a mortgage to our bank. The copy attached to the answer is a correct copy of that mortgage.

Redirect Examination.

I did not know on July 13, 1911, that Trathen was owing other parties. I knew there were sight drafts against him but I did not know how much, or to what extent. I never talked with Mr. [25] Wolfe regarding his having any accounts. The occasion of the closing of the Trathen account at our bank was that Mr. Trathen desired more money and I declined to make a larger loan and was supported by the directors. He wanted more money to take up some of these sight drafts to put his business in better condition. I was not present at any conference between the officers and directors of the First National Bank and of the Stockgrowers' Bank when this account was discussed. I do not know that there was any such conference. In a general way I discussed with the officers and directors of my bank the fact Trathen wanted more money and merely in a general way

(Testimony of F. E. Austin.)

called attention to the fact these drafts were out. Mr. Chattin was one of the directors to whom I spoke. I considered the Trathen account unsatisfactory because I had made demands for accrued interest and it was not forthcoming. I imagine I had investigated his assets and knew practically what they consisted of. I presume I advised the Board of Directors as to what his property consisted of though I cannot say positively. The First National Bank took a mortgage from the Thompson Furniture Company when that account was transferred to our Bank.

[Testimony of G. W. Herder, for Plaintiff.]

G. W. HERDER, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I live at Mountainhome. I am President and Manager of the W. L. Thompson Furniture Company, Limited, having held these positions for a little over five years last past. In July, 1911, that company was banking with the Stockgrowers' State Bank. I had a loan of \$3,400.00 and there was some interest and I believe a little overdraft. The account was then transferred to the First National Bank. The Stockgrowers' Bank called the loan and I got the money from the other bank to pay them by a loan secured by a mortgage. I did not have the ready money to meet the Stockgrowers' loan and in looking around for another loan, Mr. Montgomery suggested that I might or could get it from the First National Bank [26] and I took it up with Montgomery and Chattin and the bank gave me the loan. I gave additional security and the Stockgrowers'

(Testimony of G. W. Herder.)

loan was paid that way. Mr. Montgomery suggested to me that I could get this loan in my place of business and then I met Montgomery and Chattin and one or two other officers of the bank. I was called in by them after I had been talking with Montgomery. Montgomery, Chattin and Ake were in there part of the time and also Roscoe Smith. Montgomery did most of the talking, stating that the Stockgrowers' wanted the loan paid and that the First National would give me the money. Mr. Smith informed me that they could not any longer carry me. He was an officer in the Stockgrowers' Bank at that time. I believe Chattin and Montgomery did the talking principally. Smith was not in there only a little while and he took part this far, he advised me the Stockgrowers' wanted the loan closed up. Montgomery was the first man who suggested my getting the loan at the First National Bank. He came into my place of business and I don't remember just how it came up but he told me I could get the sum from the First National. I don't think I asked him for it; it was in general conversation that it was brought up.

Cross-examination.

I gave the First National additional security for the money I borrowed. The security was ample. Mr. Green drew up the mortgage. The security consisted of a mortgage on the stock and on the store building, together with 160 acres of timber land and my residence and grounds. Mr. Green, their attorney, drew up the mortgage.

[Testimony of E. M. Wolfe, for Plaintiff.]

E. M. WOLFE, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I have been practicing law at Mountainhome for about twenty years. I know Trathen and had some accounts against him for collection in July, 1911. I did not call the attention of [27] the Stockgrowers' State Bank to this fact at the time their mortgage was taken. All of these accounts I held were included in the mortgage. I supposed I would get the money due on these accounts out of the loan, but did not. I talked with Mr. Trathen and Mr. Green, the latter representing the Stockgrowers' Bank. Trathen knew I had the accounts and it seemed that if he could get enough to take care of the accounts I held he would be able to get along nicely and take care of his business, and if he would give everything that he had practically, in the way of furniture, book accounts, etc., as security to the Stockgrowers' State Bank, they would give him the money. I understood the First National was wanting its loan cleaned up. The accounts I had amounted to a little over \$800.00. I was pressing these accounts while the First National had the mortgage against Mr. Trathen. Green knew at the time the Stockgrowers' Bank took the mortgage that I had these accounts. These accounts were not secured in any way.

Cross-examination.

As I remember, Trathen held out to us that the new mortgage would take care of his pressing ac-

(Testimony of E. M. Wolfe.)

counts and that he would be able to protect himself sufficiently if this arrangement was made and would be able to conduct his business as he had theretofore. I thought what he said was true.

Redirect Examination.

I don't think Trathen represented to me that the claims I had were all he owed, but he represented to me that they were all crowding him. I understood that he was securing all those that were due and pressing for payment. I don't think I had any idea as to what he owed. I receipted to Trathen for all his bills that I had. I was looking to the Bank and thought the bank would pay me my money. I talked to Mr. Green and the reason he gave me for not paying the money was that this stuff did not check out right. That the storehouse contained a lot of stuff that belonged to other people and was not the property of Mr. Trathen. I was [28] not the attorney for either of these banks at this time. Mr. Green was representing both of them.

**[Testimony of J. H. Whitson, for Plaintiff
(Recalled).]**

J. H. WHITSON, being recalled, testified as follows:

I do not believe that Mr. Trathen rendered any accounts and paid over money from sales he made after we took our mortgage. He kept open and was offering goods for sale up to the time of foreclosure. He never at any time accounted for daily sales. He was in possession of his property until the sheriff

(Testimony of J. H. Whitson.)

took possession and was offering it for sale in the ordinary course of business. I imagine he made sales from time to time. The Stockgrowers' Bank bought the stock at the foreclosure sale. I do not know the amount for which the bank bid in this property. I did not give Trathen's account credit for any sum whatever on our books.

Cross-examination.

It was my understanding our bank foreclosed this mortgage because Mr. Trathen failed to meet the terms of it.

**[Testimony of F. E. Austin, for Plaintiff
(Recalled):]**

F. E. AUSTIN, recalled, testified as follows:

During the time the First National Bank held a mortgage on Trathen's goods, he was in possession selling in the ordinary course of business, making his customary deposits and withdrawals but he did not report particularly as to what he had sold or how much, nor have it specifically applied on the mortgage. I take it that he was buying new goods and selling out what goods were in.

[Testimony of W. H. Savidge, for Plaintiff.]

W. H. SAVIDGE, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I am referee in bankruptcy. The Trathen estate has been referred to me.

The following is a statement of the names of parties who have filed claims against the estate and the amount of each claim, and the date of the last item in the account: [29]

(Testimony of W. H. Savidge.)

Hazzard & Markinson Company for \$36.65; the item shown on their bill, attached to their proof, April 26, 1911; the claim of Chippenden & Eastman Company, \$580.03; the last item is April 5, 1911; the claim of Wm. Volker & Co.; September 29, 1908, there were five credits after that time; the bill as proven is \$51.11 as credits were during 1908 and 1910 the last credit was November 21, 1910, for \$20.00; the claim of McEntyre Bros. August 10, 1910; \$26.00 is their proven claim; Burley & Tyrell Co. September 21, No. November 14, 1910; there was a cash payment—credit afterward; the bill is \$50.11; F. S. Harmon & Co., \$40.45; the last item is February 20, 1909; Art Manufacturing Co., \$27.50 with interest thereon from the 12th day of December, 1909; 33 Heywood Bros. and Wakefield Company, March 27, 1911, \$20.45; Nulac Co., \$16.00; that simply gives June 30th without any year; Salt Lake Mattress & Manufacturing Co., \$112.83, May 15, 1911; Allen, Wright Furniture Company, December 8, 1910, \$44.20; Simmons Hardware Company, February 23 —I simply name there the date of the last item; the amount is \$153.40; Crystal Refrigerator Company, March 3d, \$57.18; the H. Lauter Company, June 1, \$41.86; Electric Paint & Varnish Company, April 15, 1911, \$32.45; Boyle Furniture Co., \$841.23; July 27, 1911, \$30.00. The item before that was \$9.80 on July 18, 1911, and the item before that is July 13, 1911, \$34.92. All of the other items were prior to July 13. Those are all of the claims filed, sworn to and approved.

(Testimony of W. H. Savidge.)

Cross-examination.

The plaintiff here had an investigation of this matter before me at Mountainhome, Mr. Trathen, Mr. Whitson, Mr. Green, Mr. Herder, Mr. Corker were witnesses. I think Mr. Montgomery and some other gentlemen from the bank besides Mr. Whitson. I think it was Mr. Jacobson. I think Mr. Lee did not testify. They went into the matter quite fully. I know nothing of these accounts and claims except as the bills show them. [30]

**[Testimony of E. M. Wolfe, for Plaintiff
(Recalled).]**

E. M. WOLFE, being recalled, testified as follows:

I do not suppose, although I do not remember, that any of the accounts I had for collection are included in the list given by Mr. Savidge. I do not remember anything about it, but I do not see how that could be.

Plaintiff rested thereupon.

[Evidence of Defendant.]

Whereupon the defendant introduced the following evidence:

The note of Thomas Trathen for \$3,147.84 to the Stockgrowers' State Bank dated July 13, 1911, was then introduced as Defendant's Exhibit "A." A copy of it is to be found in the mortgage to the Stockgrowers' Bank, a copy of which mortgage is attached to the answer of that defendant. An assignment to the First National of the mortgage

(Testimony of E. M. Wolfe.)

given by Trathen to Evans and Owens was then received in evidence. This assignment is dated the 13th day of June, 1911, and is signed and acknowledged by the said *mortgages* and is in all respects in legal form.

Whereupon the case was submitted to the Court; but, after argument, plaintiff was permitted to amend his bill of complaint and the following proceedings were had:

[Testimony of Thomas Trathen, for Plaintiff.]

THOMAS TRATHEN, a witness on behalf of plaintiff, being first duly sworn testified as follows:

I reside at Hammett and am the bankrupt in this case. The mortgage to the Stockgrowers' Bank was upon my entire stock of goods. I don't know as any exact inventory was taken at the time of giving the mortgage. I think somewhere about a month or two before that time I did make a statement to the bank as nearly as I can get at it as to what the inventory did amount to. Shortly previous to the sheriff's sale an exact inventory was taken by Mr. Cowan. I assisted him some. This was somewhere about three or four months after the giving of the mortgage. There was very little change in the condition of the stock between the giving of [31] the mortgage and the taking of the inventory. The inventory showed the goods to be worth about \$2,500.00, and they were purchased at the foreclosure at the exact figures shown by the inventory.

The sales and purchases were both very light and

(Testimony of Thomas Trathen.)

amounted to about the same. The value of the goods was about the same. There was no arrangement between myself and the bank whereby it was to bid the stock in for the amount the inventory showed it to be worth. I had two lots at the time of the giving of the mortgage and had an interest in the dwelling property I was living in. That was all the property I had outside of the stock of goods. There was a cloud on the title of these lots and a five hundred dollar mortgage on them. I think that mortgage was about one-half paid. I consider the lots worth about Five Hundred Dollars. The only offer I had for them was three hundred fifty.

I also had two lots with my home on them. There were three different mortgages on those lots. They were sold in the case of the Mountainhome Lumber Company against me by the sheriff in foreclosure on the 7th day of April, 1911. There was no difference in my financial condition between the time of giving the mortgage and my being adjudicated a bankrupt.

I had an agreement with Smith and Moyses that they would take up the other mortgages on my home and allow me six months to redeem in. They held the third mortgage. They afterwards went back on their agreement.

Cross-examination.

My home was built about two years previous to the foreclosure. It cost me better than forty-three hundred dollars. I think that was what it was worth at the time of giving the mortgage to the Stockgrowers' State Bank, a little more, perhaps

(Testimony of Thomas Trathen.)

for there were some improvements in the shape of lawn, trees, [32] cement walks and the like.

The property was sold under foreclosure for \$2,600.00. That included all of the mortgages except \$600.00 to Smith and Moyses. The three lots cost \$425.00 and the same number of lots across the alley facing the street but not as desirable as mine sold two years after for \$650.00. I think with the improvements that it had a value in excess of forty-three hundred dollars.

Shortly before giving the mortgage to the stock-growers' State Bank they requested a statement and I made one to them. I had made two or three previous statements from year to year.

I bought the furniture property from Cowan. I made written statements to the First National from time to time of my financial conditions.

The statements made by Trathen to the First National Bank in 1908 and in 1909 having been identified, were offered in evidence and on objection were refused admission as being too remote in time. A similar statement, dated January 12, 1910, was admitted. The material parts of it are as follows:

(Testimony of Thomas Trathen.)

[Excerpts from Statement, Dated January 12, 1910.]

Mountainhome, Idaho.

Statement June 12, '10.

Furniture stock	\$5350.00
House	3300.00
Two lots	350.00
Furniture in house.....	2200.00
Great Western note....	750.00 and int.
Forty acre water right ..	1000.00 applied at Sunny-
	side.
120 " " "	held as security.
Acct. due.....	1150.00

INDEBTEDNESS.

Mortgage on house	\$2580.00	
		including First
		Nat. Note.
On stock	2400.00	
Evans Baily note	500.00	
		net \$8670.60.

[33]

In addition I have 160 acres desert at Sunnyside 60 acres cleared and burned this season at a cost of \$200.00. I have \$4000.00 in notes for locating that will be due after segregation is allowed by the state.

Signed—THOMAS TRATHEN.

(Witness continuing:) My stock at the time of the mortgage to the Stockgrowers' Bank was a little better grade of goods than that I purchased of Cowan. It was not so much of staples, such as

(Testimony of Thomas Trathen.)

mattresses and springs. He carried a larger wholesale stock. I should say it compared very favorably. In my statement of June, 1910, I gave the stock of goods as worth \$5,330.00 that was the value of that stock in my opinion.

At the time I made this report in June, 1910, I also had 160 acres of desert land at Sunnyside. I still had it at the time I gave the mortgage to the Stockgrowers' State Bank, July, 1911. I made the entry on October 12, 1907, and it was regular in all respects and had not been cancelled. I got two years' extension and this afternoon I expect to ask a further extension. I consider it worth at that time five hundred dollars. I paid two hundred dollars besides making improvements, costing about two hundred dollars.

I also had some notes in the amount of about four thousand dollars. They were conditional notes given by some parties whom I had located on lands at Sunnyside. If the segregation went through, they were to pay me these notes; if they did not I was to release them. The time had not expired for the determination of that question at the time I gave the mortgage to the Stockgrowers' State Bank in 1911. It was still pending before the public officers.

Redirect.

The segregation I spoke of did not go through. These [34] notes never became actual assets. There has always been a possibility of getting water to this land and there was one at the time of giving

(Testimony of Thomas Trathen.)

the mortgage to the Stockgrowers' State Bank. The water right I had for this land had never been applied to it and the Great Western Beet Sugar system can never supply any water for it. I listed the house and lot in this statement at thirty-three hundred dollars, but that is not what I consider it worth on June 12, 1910. I made improvements from that time on. The place cost me forty-two hundred dollars with improvements.

Recross-examination.

My Sunnyside land is in an Irrigation District. In July, 1911, the District had not been organized. There was just the Water Users Association.

[Testimony of J. M. Cowen, for Plaintiff.]

J. M. COWEN, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I reside at Mountainhome. I am an undertaker but was formerly in the furniture business. Was engaged in that business at Mountainhome for three years. I sold that business to Trathen. I made an inventory of his stock of goods in 1911. It was taken from bills Trathen had largely and also from catalogues, when we could not find the bills. We also took the cost price as marked on them. In fixing the values we consider the cost of the goods, the wholesale prices of the different firms and added the freight. Most of the goods were in good condition. The price fixed was the full value of the goods on that basis. I am not positive about it but I think I reported the value of these goods to Mr. Montgomery. I think the inventory was some-

(Testimony of J. M. Cowen.)

where in the neighborhood of forty-five hundred dollars.

Cross-examination.

That stock of goods had a value as a growing concern in excess of the value of the articles total up. If a person bought the stock to continue the business it would have a better [35] value than what the inventory would show.

[Testimony of L. B. Green, for Plaintiff.]

L. B. GREEN, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I was the attorney for the Stockgrowers' State Bank in taking this mortgage and the foreclosure of it. I had an inventory taken by Mr. Cowen and Mr. Trathen just before the sale. I think it showed something like twenty-six hundred dollars. I think the bid at the sheriff's sale was the same amount as shown by the inventory. The bid at the sheriff's sale was \$2,465.18, as appears from the return now shown me.

[Testimony of C. E. Norrell, for Plaintiff.]

C. E. NORRELL, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I have lived at Mountainhome for the past seven years, *being the* insurance and real estate business. I am acquainted with the market value of real estate in Mountainhome and was on July 13, 1911. I know the Trathen home place. Its fair value at that time was not to exceed three thousand dollars. The fair value of the two lots in Linton's addition would not exceed two hundred fifty dollars.

(Testimony of C. E. Norrell.)

I should not consider that the desert entry had any real value on the 13th day of July, 1911. It might have a speculative value.

Cross-examination.

It might have had a market selling value.

Redirect Examination.

Desert entries around Mountainhome and Sunnyside never had any real value—just taken for speculation. I don't know of any desert entries selling or changing hands in the vicinity of Sunnyside at that time.

**[Testimony of C. E. Corker, for Plaintiff
(Recalled).]**

C. E. CORKER, being recalled, testified as follows:

I have lived at Mountainhome since 1894 except five or six years I lived at Glenn's Ferry. I have been interested in matters at Mountainhome and that vicinity since 1879. I have had considerable experience in the matter of making loans in that vicinity and investigating the values of property. I think the [36] fair value of the Trathen home place would not exceed twenty-seven hundred dollars.

Plaintiff thereupon rested.

[Testimony of L. B. Green, for Defendants.]

L. B. GREEN, being called as a witness on the part of the defendants, testified as follows:

I was attorney for the Stockgrowers' State Bank and the First National Bank in July, 1911, regard-

(Testimony of L. B. Green.)

ing this transaction. There was a meeting of the directors of the First National and Mr. Chattin phoned me to come down and I think instructed me to prepare notes and mortgages to include the Trathen debt at that bank and some debts Mr. Wolfe had. I went with Mr. Trathen to get the amount of these debts when the cashier told me I need not draw the papers and I did not. I think Mr. Chattin was the next one who spoke to me about the matter. He said he was trying to get the loan for Trathen at the Stockgrowers' State Bank and it may have been three or four days after that when he told me to draw the papers for the Stockgrowers' State Bank and to cover the amount of the debts Wolfe had and that held by the First National. I had talked with Trathen about the matter. The mortgage was to cover the stock in the two buildings, and I think some book accounts, also some contracts for furniture sold on the installment plan. After the mortgage was given Trathen had charge of the business running it.

At the time of his talking to the officers of the First National I was present and it was stated that the stock was valued at between forty-five hundred and five thousand dollars. I think nearer forty-five hundred dollars. Trathen stated at that time he was quite sure it would be all right if these debts were paid and the debts Mr. Wolfe had. I understood Wolfe had all the debts that were pressing against Mr. Trathen except the mortgage on the house.

(Testimony of L. B. Green.)

Cross-examination.

I think Mr. Austin was present when I was at the First [37] National Bank. I made no inquiry of other attorneys at Mountainhome as to whether they had accounts against Trathen. Trathen said Wolfe was pressing his claims for collection. I knew that Trathen was being forced at that time to give a mortgage on his stock of goods in order to stave off accounts that were pressing him for payment. I did not make any inquiry to find out if there were any other accounts. I had had some before myself and they had been paid. The loan he first attempted to get from the First National and afterwards got from the Stockgrowers was through Mr. Chattin—that is, he was the man in the directors' meeting of the First National who was friendly to the loan. The cashier did not want the additional loan and Chattin did. He directed me to make this mortgage for the Stockgrowers.

**[Testimony of Thomas Trathen, for Defendants
(Recalled)].**

THOMAS TRATHEN, recalled as a witness on behalf of the defendants, testified as follows:

I had been in the habit of reporting my financial conditions at Mountainhome to the First National Bank for several years prior to July 1st, 1911. I signed Defendants' Exhibit "D." The report was true to the best of my judgment and was given to the First National with the view of getting credit upon it.

Exhibit "D" was then admitted in evidence and its material parts are as follows:

[Defendants' Exhibit "D"—Application for Credit.]

Application for Credit.

Place, Mt. Home, Date March 16, '09.

For the purpose of obtaining credit at the First National Bank, Mountainhome, Idaho, I state that I am at this date, worth in my own right in property not exempt from execution, above all liabilities at least five Thousand dollars and that such property is composed of the following with encumbrances as specified.

	Value.	Encumbrance thereon.
Stock furniture	\$5200.00	\$2575.00
Dwelling	3300.00	2580.00
2 lots	350.00	
Household furniture	2000.00	
Accts. due	800.00	
40 acres water right.....	1000.00	
Great Western Beet Sugar Co. notes	750.00	
<hr/>		
Other indebtedness	\$13400.00	
To 90-day note Bailey & Evans		500.00
To		[38]
To		
<hr/>		
Miscellaneous	Total,	\$5655.00

IN CONSIDERATION of the granting of such

credit to me by said Bank, I agree that in case any change occurs that materially reduces my ability to pay all claims and demands against me, I will notify said Bank without delay.

(Signed) THOMAS TRATHEN.

The same is true of Exhibit "C," which report I made to the First National Bank asking for credit in September, 1908. Exhibit "C" was then introduced in evidence and its material parts are as follows:

[Defendants' Exhibit "C"—Report, Asking for Credit.]

Financial Statement Sept. 11th, 1908.

Stock of Goods.....	\$5400.00	
House & Lots.....	3250.00	
6 lots	750.00	
Household Furniture	2000.00	
Accts. due	970.00	\$12370.00
Accounts owing for stock...	\$2600.00	
Note R. W. Smith.....	500.00	
Mortgages on house (W. Blackman)	1500.00	
Mortgages on house (Mt. Home Lumber Co.)	280.00	4880.00
		<hr/>
		\$7690.00

Over and above all indebtedness.

In addition to above I have 120 acres of water right and a fling on 160 acres of land in section 22, Sunny Side tract.

THOMAS TRATHEN.

(Testimony of **Thomas Trathen.**)

I met the Directors of the First National about the time I executed the mortgage under controversy and we talked over the situation. I told them that these claims were pressing and they asked me a few questions along the line of the condition of the stock and other things and I gave them a reply. It was substantially the same as the last report you have there with the exception of possibly some little reduction in the amount of the stock. I went into details in the condition of my finances generally. I wanted them to take up these accounts. Mr. Montgomery was the man who asked me the questions as I remember it. I told him there was not much business doing. He seemed to think there would be a little later on. I told him I thought if I could take up these accounts I would be able to take up other little accounts due; that they were the only ones pressing. I told him I had some accounts and notes to turn in as collateral. I think two or three days afterwards Green notified me that I was wanted at the Stockgrowers' State and I went there but they were busy and did not want me just then. They notified me that Mr. Green would attend to the business and the loan would be granted and the Stockgrowers' State Bank would take up the mortgage in place of the ——— and take up the First National account. I [41] don't remember of any accounts presented to me between the time of the execution of the mortgage and its foreclosure. There might have been some very small ones but I don't remember. I think I paid several little claims after that. I told

(Testimony of **Thomas Trathen.**)

the bank that those accounts were in Mr. Wolfe's hands and amounted to something like six hundred dollars and that if I could take them up I would be able to continue business. Business looked a little favorable and I told them I thought possibly I could pull through and make the business pay out.

Cross-examination.

I did not want to turn the stock over to the bank at that time but later on I did. I testified before the Referee in Bankruptcy on June 10, 1913, and among other things, I said, that at the time the mortgage was given, I had very little hope of things going ahead here; that the bank officers rather thought that things would pick up and that they were willing to take a chance with me; that they wanted me to hold the stock and try and pull out at the time of foreclosure; that I tried several times to induce them to take it off my hands because it was not paying expenses; that my idea in giving the mortgage was to secure them, and that it was agreed between the two banking concerns to transfer that account in lieu of this other mortgage, and that they would take up the account with the First National. That was my testimony. My application for a loan was to the First National and the next I heard of it I was told to go to the Stockgrowers' State Bank and Green would draw up the papers and I got the money from the Stockgrowers. I never made any arrangement whatever for getting it from the Stockgrowers. Chattin was very much instrumental in getting me the loan. He was friendly to me. I made no representations for

(Testimony of **Thomas Trathen.**)

the Stockgrowers' State. I had other debts owing at the time. I owed Chippenden-Eastman Co. but it was not [42] in Mr. Howie's hands for collection at the time. I don't remember of any conversation with Mr. Howie in regard to this matter. I gave a statement to the First National Bank of my debts and told them that I owed other debts. The total amount was about two thousand dollars. About a year before the cashier of the First National looked over my inventory books—that was Mr. Reckmyer. The next inventory was after they started to foreclose.

Redirect.

I spoke to Mr. Chattin on the street two months after giving the mortgage and he asked me how I was getting along and I said, "Nothing doing; I guess you will have to take that stock and get something out of it." The conversation I had in which I spoke of turning over the stock and I testified to at the Referee hearing was one that took place several months after the foreclosure.

I did not at or before the time of giving the mortgage try to get the officers or any of them to take the stock, but I did at the time or shortly before the foreclosure proceedings.

[**Testimony of L. B. Green, for Defendants**
(Recalled).]

L. B. GREEN, recalled as a witness on behalf of the defendants, testified as follows:

Trathen came to me and told me Howie had come with a claim and that he wanted the bank to pay out the money for this additional claim. This was a

(Testimony of L. B. Green.)

very few days, almost within a week before the foreclosure. That was the first I knew of it. The bank was surprised that there were other claims and they were disappointed or disgusted because Trathen became interested in some mines and had locked up the door and left the business in charge of the boy, and had gone over to Silver City for a week or ten days or two weeks and, as a result of the discussion we had the mortgage was foreclosed. At the time of taking this mortgage I understood that these were all of the claims. I got this [43] understanding from Mr. Trathen and the Directors of the First National on the first evening.

[Testimony of W. C. Howie, for Plaintiff.]

W. C. HOWIE, called as a witness on behalf of the plaintiff, testified:

I am an attorney at law and reside at Mountain-home for twenty-three years last passed. I think I had one or two little claims against Trathen and a large one of Chippenden-Eastman Co. I received them the early part of the summer of 1911. I am very positive about this. I went to Trathen about the account and he said he would try to arrange it. I went to him repeatedly and he said he was trying to get a loan through Chattin. I went quite a number of times because his store was shut a good deal and he was gone. I went for many times and could not find him. Finally he said Chattin had refused to take up that claim. Then I went to the Recorder's office and found this mortgage on file it had not been on file when I first talked with Trathen. I told him if he did not get

(Testimony of W. C. Howie.)

the money I would shut him up. He said he could not get the money. The next thing I knew the foreclosure proceedings were commenced and the property was in the hands of the sheriff. Thereupon the case was submitted to the Court for its decision.

Order Settling Statement of Evidence.

The above and foregoing is settled as the statement of the evidence herein, the same being the evidence taken upon the trial stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of the witnesses being stated only in narrative form.

December, 1913.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed Dec. 27, 1913. A. L. Richardson, Clerk. [44]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

CHARLES E. CORKER, Trustee of the Estate of
THOMAS TRATHEN, a Bankrupt,
Plaintiff,

vs.

STOCKGROWERS' STATE BANK OF MOUNTAINHOME and THE FIRST NATIONAL
OF MOUNTAINHOME,

Defendants.

Assignment of Errors.

And now come the defendants, Stockgrowers' State Bank of Mountainhome and First National Bank of Mountainhome, by their solicitors, and having prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree entered in the above cause on the 30th day of October, A. D. 1913, say that the said decree, made and entered as aforesaid is erroneous and unjust to these defendants and to each of them and particularly in this:

1st. Because the District Court erred in holding and concluding that the said Thomas Trathen was insolvent on said 13th day of July, 1911,

2d. Because the District Court erred in holding and concluding that the officers and directors or officers or directors or both or either of the defendants, knew on the 13th day of July, 1911, or at any other time or at all that Thomas Trathen was insolvent and unable to meet his obligations or was insolvent or unable to meet his obligation.

3d. Because the District Court erred in holding and concluding that the officers and directors or officers or directors, [45] or both or either of these defendants, conclusively or fraudulently or for any purpose or at all planned and agreed with each other and with said Trathen or at all that the amount of the same Trathen should be ostensibly or at all transferred from the said First National Bank to said Stockgrowers' State Bank, should make a pretended or any loan to said Trathen or

should secure from him any chattel mortgage whatsoever.

4th. Because the District Court erred in holding and concluding that in accordance with any such or any other agreement said Trathen did without consideration execute and deliver said note to said or any Stockgrowers' State Bank, or that he gave the said mortgage to said Stockgrowers' State Bank in accordance with any such or any agreement or understanding between said defendants.

5th. That the District Court erred in holding and concluding that the foreclosure and sale under said chattel mortgage was other than a *bona fide* transaction and proceeding for the enforcement of a valid chattel mortgage.

6th. Because the District Court erred in holding and concluding and decreeing that this or any part of said stock of furniture, notes and accounts constituted a part of the assets of said Trathen at the time he was adjudicated a bankrupt.

7th. Because the District Court erred in holding and concluding that the defendant First National Bank has ever had said furniture, notes or accounts in its possession.

8th. Because the said District Court erred in holding, concluding and decreeing that the matters set forth in plaintiff's Bill of Complaint or shown by the evidence operated as a preference or to secure a preference for either of these defendants.

9th. Because the said District Court erred in holding, concluding and decreeing that either of these defendants or their or either of their agents had

reasonable or any cause to believe [46] that the endorsement of the said note and mortgage or either of them would effect any preference whatsoever.

10th. Because the District Court erred in holding, concluding and decreeing that the transfer and mortgage or transfers or mortgage made and executed by said Trathen to said Stockgrowers' Bank was null and void as against the rights of other creditors of said Trathen or at all.

11th. Because the District Court erred in holding, concluding and decreeing that the said First National Bank by said transfer obtained a greater percentage of its debt against said Trathen than other creditors of the said class.

12th. Because the District Court erred in holding, concluding and decreeing that the said sale by the sheriff of Elmore County was and is or was or is null and void.

13th. Because the District Court erred in holding, concluding and decreeing that plaintiff should have or recover of and from said defendants or of or from either of them the said furniture described in said decree or any part thereof, or of said notes or accounts in said decree referred to.

14th. Because the District Court erred in holding, concluding and decreeing that if defendants do not redeliver said property to plaintiff in 30 days or at all from and after the filing of said decree that plaintiff have execution against said defendants or against either of them for any sum whatsoever.

15th. Because the District Court erred in hold-

ing, concluding and decreeing that plaintiff have interest on the same decreed plaintiff from the 18th day of November, 1911, or from any other time or at all. [47]

16th. Because the District Court erred in holding, concluding and decreeing that the said defendant Stockgrowers' State Bank was not entitled to the benefit of and did not hold a first lien upon the said stock of furniture superior in all respects to and not subject to the claims of the said plaintiff herein and of all other creditors of said Trathen.

17th. Because the District Court erred in holding, concluding and decreeing that the defendant Stockgrowers' State Bank was entitled to no relief by reason of the matters set forth in the VII paragraph of the answer of said defendant.

Wherefore these defendants pray that the said decree be reversed, that the District Court be directed to dismiss complainant's bill.

E. M. WOLFE,
WYMAN & WYMAN,
Solicitors for Defendants.

Service of the foregoing Assignment of Error and receipt of a copy thereof admitted this 19th day of December, 1913.

HARRY S. KESSLER,
per E. M.,
Solicitors for Plaintiff.

[Endorsed]: Filed Dec. 19, 1913. A. L. Richardson, Clerk. [48]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

CHARLES E. CORKER, Trustee of the Estate of
THOMAS TRATHEN, a Bankrupt,
Plaintiff,

vs.

STOCKGROWERS' STATE BANK OF MOUN-
TAINHOME and THE FIRST NATIONAL
OF MOUNTAINHOME,

Defendants.

Petition for Appeal and Order Allowing the Same.

The above-named defendants in the above-entitled cause, Stockgrowers' State Bank of Mountainhome and First National Bank of Mountainhome, conceive themselves aggrieved by the order and decree made and entered by the above-entitled court in the above-entitled cause on the 30th day of October, 1913, and do hereby appeal for the United States Circuit Court of Appeals for the 9th Circuit for the reasons as set forth and specified in the Assignment of Errors, which is filed herewith; and said defendants pray that this appeal may be allowed and that citation issue as provided by law and that a transcript of the records, proceedings and papers on which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

E. M. WOLFE,
WYMAN & WYMAN,
Solicitors for Defendants.

Service of the foregoing Petition and receipt of a copy thereof admitted this 19th day of December, 1913.

HARRY S. KESSLER,

per E. M.,

Solicitors for Complainant. [49]

[Order Allowing Appeal.]

AND NOW, to wit, on the 19th day of December, 1913, it is ordered that the petition be granted and that the appeal be allowed as prayed for.

FRANK S. DIETRICH,

District Judge.

[Endorsed]: Filed Dec. 19, 1913. A. L. Richardson, Clerk. [50]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

CHARLES E. CORKER, Trustee of the Estate of
THOMAS TRATHEN, a Bankrupt,
Plaintiff,

vs.

STOCKGROWERS' STATE BANK OF MOUNTAINHOME and THE FIRST NATIONAL BANK OF MOUNTAINHOME,
Defendants.

Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, the Stockgrowers' State Bank of Mountainhome and the First National Bank of Mountainhome, as principals, and the United States Fidelity

and Guaranty Company of Baltimore, Maryland, a corporation, organized under the laws of the State of Maryland, as surety, are held and firmly bound unto Charles E. Corker, Trustee of the estate of Thomas Trathen, a bankrupt, in the penal sum of One Thousand Dollars, to be paid to the said Charles E. Corker, Trustee of the estate of Thomas Trathen, a bankrupt, his successors in trust, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents. Sealed with our seals and dated this 17th day of December, 1913. Whereas, the above-named defendants, Stockgrowers' State Bank of Mountainhome and the First National Bank of Mountainhome, have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree in the aforesaid suit made and entered in the said United States District Court for the District of Idaho, Southern Division, on the 30th day of October, A. D. 1913.

Now, therefore, the condition of this obligation is such that if the above-named defendants and appellants shall prosecute [51] their said appeal to effect and answer all costs if they fail to make their said plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

IN WITNESS WHEREOF the said defendants, Stockgrowers' State Bank of Mountainhome and the First National Bank of Mountainhome, have caused their names to be subscribed hereto and their seals to be affixed and the said United States Fidelity and

Guaranty Company of Baltimore, Maryland, as surety, has caused its name to be subscribed and its corporate seal to be affixed by its attorneys in fact thereunto duly authorized by its Board of Directors.

STOCKGROWERS' STATE BANK OF
MOUNTAINHOME.

[Seal] By J. H. WHITSON,
As Its Cashier.

FIRST NATIONAL BANK OF MOUN-
TAINHOME.

[Seal] By WILL T. MONTGOMERY,
As Its Asst. Cashier.

UNITED STATES FIDELITY AND
GUARANTY COMPANY OF BALTI-
MORE, MARYLAND.

[Seal] By ELIZABETH GREENWALD, and
E. M. WOLFE,
Its Attorneys in Fact.

The form of the foregoing bond and the sufficiency of the sureties is approved this 19th day of December, 1913.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed Dec. 19, 1913. A. L. Richard-
son, Clerk. [52]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

CHARLES E. CORKER, Trustee of the Estate of
THOMAS TRATHEN, a Bankrupt,
Plaintiff,

vs.

STOCKGROWERS' STATE BANK OF MOUN-
TAINHOME and THE FIRST NATIONAL
BANK OF MOUNTAINHOME,
Defendants.

Praeceptum for Transcript on Appeal.

To the Clerk of the Above-entitled Court:

The appellants herein desire that there should be incorporated into the transcript on the appeal taken herein the following and no other portions of the record:

The complaint;

The answers of the defendants:

The decree;

The statement of the evidence;

The assignment of errors;

The petition for appeal and order allowing the same;

The bond on appeal and approval thereof;

The citation,

E. M. WOLFE,

WYMAN & WYMAN,

Defendants' Solicitors.

The appellee herein consents that the transcript may consist of the above and foregoing papers and

accepts due service of the above and foregoing praecipe.

December 22, 1913.

W. C. HOWIE and
HARRY S. KESSLER,
Appellee's Solicitors.

[Endorsed]: Filed Dec. 23, 1913. A. L. Richardson, Clerk. [52½]

[Citation on Appeal (Original).]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

CHARLES E. CORKER, Trustee of the Estate of
THOMAS TRATHEN, a Bankrupt,
Plaintiff,

vs.

STOCKGROWERS' STATE BANK OF MOUNTAINHOME and THE FIRST NATIONAL BANK OF MOUNTAINHOME,
Defendants.

United States of America,—ss.

The President of the United States to Charles E. Corker, Trustee of the Estate of Thomas Trathen, a Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the

United States of the District of Idaho, Southern Division, wherein you are the complainant and appellee, and the Stockgrowers' State Bank of Mountainhome and First National Bank of Mountainhome are defendants and appellants, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf;

Witness, the Honorable EDWARD DOUGLASS WHITE, [53] Chief Justice of the Supreme Court of the United States of America, this 19th day of December, A. D. 1913, and of the Independence of the United States the one hundred thirty-eighth year.

FRANK S. DIETRICH,
United States District Judge for the District of Idaho.

[Seal] Attest: A. L. RICHARDSON,
Clerk.

Service of the foregoing citation and receipt of a copy thereof admitted this 19th day of December, 1913.

W. C. HOWIE,
HARRY S. KESSLER,
Solicitors for Complainant. [54]

[Endorsed]: No. 449. In the District Court of the United States for the District of Idaho, Southern Division. Charles E. Corker, Trustee of the Estate of Thomas Trathen, a Bankrupt, Plaintiff, vs. Stockgrowers' State Bank of Mountainhome and the First National Bank of Mountainhome, Defendants. Citation. Filed Dec. 19, 1913. A. L. Richardson, Clerk. [54½]

Return to Record.

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk. [55]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States for the
District of Idaho, Southern Division.*

CHARLES E. CORKER, Trustee of the Estate of
THOMAS TRATHEN, a Bankrupt,
Plaintiff,

vs.

STOCKGROWERS' STATE BANK OF MOUN-
TAINHOME and THE FIRST NATIONAL
BANK OF MOUNTAINHOME,
Defendants.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 56, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon appeal, in accordance with the praecipe on file herein, to the

United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$33.90, and that the same has been paid by the appellant.

Witness my hand and the seal of said Court, affixed at Boise, Idaho, this 5th day of January, 1914.

[Seal]

A. L. RICHARDSON,

Clerk. [56]

[Endorsed]: No. 2368. United States Circuit Court of Appeals for the Ninth Circuit. Stockgrowers' State Bank of Mountainhome, a Corporation, and the First National Bank of Mountainhome, a Corporation, Appellants, vs. Charles E. Corker, Trustee of the Estate of Thomas Trathen, a Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

Received and filed January 14, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

2308
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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

STOCKGROWERS STATE BANK OF MOUNTAIN-
HOME, a Corporation, and THE FIRST NAT-
IONAL BANK OF MOUNTAINHOME, a Cor-
poration, Appellants,

vs.

CHARLES E. CORKER, Trustee of the Estate of
Thomas Trathen, a Bankrupt, Appellee.

APPELLANTS' BRIEF.

*Upon Appeal from the United States District Court for the
District of Idaho, Southern Division.*

E. M. WOLFE,
WYMAN & WYMAN,
Appellants' Solicitors.

Filed

Statesman Shop, Boise, Idaho.

AUG 11 1914

F. D. Monckton.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

**STOCKGROWERS STATE BANK OF MOUNTAIN-
HOME, a Corporation, and THE FIRST NAT-
IONAL BANK OF MOUNTAINHOME, a Cor-
poration, Appellants,**

vs.

**CHARLES E. CORKER, Trustee of the Estate of
Thomas Trathen, a Bankrupt, Appellee.**

APPELLANTS' BRIEF.

*Upon Appeal from the United States District Court for the
District of Idaho, Southern Division.*

STATEMENT OF THE CASE.

This action was brought by the appellee as trustee in bankruptcy to set aside not only a mortgage given by the bankrupt but also a foreclosure sale thereunder and to recover possession of the mortgaged property. We believe there is no serious dispute as to the facts.

Trathen, a furniture dealer in Mountain Home, Idaho, was adjudged a bankrupt on October 23rd, 1911. Some years prior to the time of the transaction here complained of, he had been a customer of the Stockgrowers State Bank of that city (p. 29) but, for some cause not shown in the record nor material to the decision of the case, had transferred his account to the First National Bank, also of Mountain Home, where he had transacted his

banking business for several years prior to the events out of which this case arose.

He was a borrower at the First National Bank probably from the beginning of his relations there and from time to time rendered that bank financial statements as bases for credit. These statements are to be found at pages 42, 49 and 50 of the transcript. They show his claimed assets to be well about the amount of his debts—in other words, if the statements were true, he was perfectly solvent. It was under these representations and conditions that the First National Bank made its loans to Trathen and carried his account.

On April 12, 1909, he gave the bank a note for \$1,700.00, due in three months, upon which W. D. Evans and John Owens were liable as sureties or guarantors. The latter, to secure themselves against loss upon their signatures, took a chattel mortgage on Trathen's stock of goods, which they caused to be placed on record as required by law. A copy of this mortgage is found at page 13 of the transcript.

This mortgage was afterwards assigned to the First National Bank, where it was thereafter held as security for Trathen's obligation (p. 38-39). In addition to this, the bank held Trathen's unsecured note for \$500.00 (p. 30).

This was the situation on July 13, 1911, when Trathen applied to the First National Bank for a further loan. Mr. Chattin, president and a director of the bank, favored the loan and went so far as to instruct the bank's attorney to prepare the notes and mortgage, which were to include the Trathen debt at that bank and some claims Mr. Wolfe had (p. 47). Mr. Montgomery, also a director

and the assistant cashier, was likewise perfectly willing to make the loan (p. 53).

The cashier, Mr. Austin, was dissatisfied with the account (p. 32) and refused to extend the accommodation (p. 31). The matter was carried to the board of directors for final decision.

Trathen was called before the board and his financial condition was discussed. He represented that business was dull but that, if he could borrow enough to take up the accounts Mr. Wolfe held, he would himself be able to take up others; and that Mr. Wolfe's accounts were the only ones pressing him. Despite the fact the president and assistant cashier desired to make the additional loan, the cashier's position "was supported by the directors" (p. 31), and the additional loan was declined and it was made plain to Trathen that the situation was unsatisfactory to the bank.

The First National Bank at the time had *R. P. Chattin* as President, F. E. Austin as Cashier, and these men, together with *Montgomery*, Hein, Pence and Blunk constituted its Board of Directors (p. 30). The officers of the Stockgrowers State Bank then were F. P. Ake, President; Worth S. Lee, Cashier, who with *Chattin*, *Montgomery*, Hall, Cowen and Blackman formed its board of directors (p. 29). *Chattin* and *Montgomery* were directors in both institutions and it was these men who were the particular friends of Trathen and who sought to have the First National Bank continue to carry him. Failing in this, these directors went to the Stockgrowers Bank where, as we have seen, Trathen had at one time banked and they induced it to take over the Trathen account.

The record shows but very meagerly what took place at the latter bank. *Chattin* was very instrumental in

getting the loan (p. 54) and there would seem to be no question but that it was through his and Montgomery's efforts the latter bank was induced to agree to loan Trathen the money he needed to take up the debt due the First National Bank as well as to Mr. Wolfe's clients.

The note and mortgage were executed and the latter recorded on the 13th day of July, 1911 (p. 52), and the amount due the First National Bank was paid to it.

At about the same time as the matters heretofore related, the Stockgrowers Bank called a loan it had made a Mr. Herder of the Mountain Home Furniture Company and he paid that bank through a loan secured from the First National Bank (p. 32). This loan was obtained largely through the efforts of Chattin and Montgomery, through Roscoe Smith, an officer in the Stockgrowers Bank, took some part in the negotiations (p. 32-33). Considerable was attempted to be made of this transaction by appellee in the court below. It must not be forgotten that the Herder loan was a perfectly good one (p. 30-33). The net result to the Stockgrowers Bank of the two transactions was that it paid the First National Bank \$2,294.35 and agreed to pay Mr. Wolfe \$853.49, making a total of \$3,147.84 (p. 29) and it received from the First National Bank about \$3,606.69 (p. 30). So it received \$1,312.34 more than it paid out.

Before actually paying Mr. Wolfe the amount due his clients, the Stockgrowers Bank ascertained that the stock on which it had a mortgage was not entirely satisfactory. The bank supposed it was getting a lien on property it subsequently found was not included in its mortgage (p. 35). In accordingly refused to pay the money due to Mr. Wolfe (p. 35). Mr. Trathen begun neglecting his business, allowing his store to remain closed for days at a

time (p. 56); he failed to comply with the conditions of the mortgage; the bank became dissatisfied with the situation and began foreclosure proceedings (p. 56). The Sheriff, on the 2nd day of October, 1911, sold the property on foreclosure to the Stockgrowers Bank for \$2,465.18 (p. 45).

On October 23, 1911, Trathen was adjudged a bankrupt, and on December 19th, 1911, Corker, the Trustee, demanded possession of the goods from the Stockgrowers Bank, but, though informed that the bank was in possession under claim of ownership and waiting for some one to contest its claim, the trustee did nothing further until August 8, 1913, considerably over a year and a half, when he commenced this action. During all this time he Stockgrowers Bank held the property intact awaiting some action on the part of the trustee. The defendants promptly answered and the cause came on for trial on October 8th, 1913. The Court below held the mortgage to the Stockholders Bank to be null and void, that the First National Bank secured thereby a greater percentage of its debt than other creditors of the same class; that the sale on foreclosure was also null and void, and it decreed that the plaintiff recover the stock of furniture, notes and accounts and that, should the defendants not deliver the property to plaintiff within twenty days after the filing of the decree, plaintiff have execution against them for \$2,465.18, the value of the furniture, with interest from November 18, 1911, and costs of suit.

SPECIFICATION OF ERRORS.

1st. The District Court erred in holding and concluding that the said Thomas Trathen was insolvent on the 13th day of July, 1911.

2nd. The District Court erred in holding and concluding that the officers and directors or officers or directors or both or either of the defendants, knew on the 13th day of July, 1911, or at any other time or at all, that Thomas Trathen was insolvent and unable to meet his obligations or was insolvent or unable to meet his obligation.

3rd. The District Court erred in holding and concluding that the officers and directors or officers or directors or both or either of these defendants, conclusively or fraudulently or for any purpose or at all planned and agreed with each other and with said Trathen or at all that the amount of the same Trathen loan should be ostensibly or at all transferred from the said First National Bank to said Stockgrowers State Bank and that said Stockgrowers Bank should make a pretended or any loan to said Trathen or should secure from him any chattel mortgage whatsoever.

4th. The District Court erred in holding and concluding that in accordance with any such or any other agreement said Trathen did without consideration execute and deliver said note to said or any Stockgrowers State Bank, or that he gave the said mortgage to said Stockgrowers State Bank in accordance with any such or any agreement or understanding between said defendants.

5th. The District Court erred in holding and concluding that the foreclosure and sale under said chattel mortgage was other than a bona fide transaction and proceeding for the enforcement of a valid chattel mortgage.

6th. The District Court erred in holding and concluding and decreeing that this or any part of said stock of furniture, notes and accounts constituted a part of the assets of said Trathen at the time he was adjudicated a bankrupt.

7th. The District Court erred in holding and concluding that the defendant First National Bank has ever had said furniture, notes or accounts in its possession.

8th. The District Court erred in holding, concluding and decreeing that the matters set forth in plaintiff's Bill of Complaint or shown by the evidence operated as a preference or to secure a preference for either of these defendants.

9th. The said District Court erred in holding, concluding and decreeing that either of these defendants or their or either of their agents had reasonable or any cause to believe that the execution of the said note and mortgage or either of them would effect any preference whatsoever.

10th. The District Court erred in holding, concluding and decreeing that the transfer and mortgage or transfers or mortgage made and executed by said Trathen to said Stockgrowers Bank was null and void as against the rights of other creditors of said Trathen or at all.

11th. The District Court erred in holding, concluding and decreeing that the said First National Bank by said transfer obtained a greater percentage of its debt against Trathen than other creditors of the said class.

12th. The District Court erred in holding, concluding and decreeing that the said sale by the sheriff of Elmore County was and is or was or is null and void.

13th. The District Court erred in holding, concluding and decreeing that plaintiff should have or recover of and from said defendants or of or from either of them the said furniture described in said decree or any part thereof, or of said notes or accounts in said decree referred to.

14th. The District Court erred in holding, concluding and decreeing that if defendants do not deliver said property to plaintiff in 30 days or at all from and after

the filing of said decree that plaintiff have execution against said defendants or against either of them for any sum whatsoever.

15th. The District Court erred in holding, concluding and decreeing that plaintiff have interest on the sum decreed plaintiff from the 18th day of November, 1911, or from any other time or at all.

16th. The District Court erred in holding, concluding and decreeing that the said defendant Stockgrowers State Bank was not entitled to the benefit of and did not hold a first lien upon the said stock of furniture superior in all respects to and not subject to the claims of the said plaintiff herein and of all other creditors of said Trathen.

17th. The District Court erred in holding, concluding and decreeing that the defendant Stockgrowers State Bank was entitled to no relief by reason of the matters set forth in the VII paragraph of the answer of said defendant.

CORRECTION OF RECORD.

We regret the necessity of calling attention to an error in the record. By some inadvertance occurring in the type written statement of the case, a page seems to have been so transposed that pages 51 and 52 of the printed record should follow the fifth line on page 29. This correction is made by stipulation of the parties filed herein.

ARGUMENT.

While we have included in our specification of errors practically all those heretofore assigned, it is apparent the discussion may be considerably narrowed. We think the record presents primarily the question whether at the time the Trathen loan was made appellants believed or has

reasonable ground to believe that Trathen was insolvent. The circumstances of the giving of that mortgage and of the relationship between the banks are important only as they throw light upon that question.

It is unnecessary to restate the evidence. The record is short and such differences of opinion as there may be upon its reading arise more as to the inferences properly to be drawn and conclusions reached from the facts than as to what are the facts themselves.

When Trathen, in 1909, obtained his loan of \$1,700.00 from the First National Bank, he gave that bank the security of two other signers, Evans and Owens. They secured themselves against loss by a mortgage on his stock of goods. While it is true this mortgage was afterwards assigned by them to the bank that it might be more directly secured, such action was unnecessary. The security so held by the sureties enured to the benefit of the bank without such assignment.

Hampton vs. Phipps 108 U. S. 260.

Courier-Journal T. P. Co. vs. Shaefer M. B. Co. 101 Fed. 699.

Swift & Co. vs. Kortrecht, 112 Fed. 713.

The wide application of this rule is shown in 32 Cyc. 145 to 149. The assignment of the mortgage by the sureties to the First National Bank, while unnecessary, was perfectly valid.

32 Cyc. 148.

So the First National Bank had, at the time of this transaction, a mortgage on the merchandise in question securing Trathen's note of \$1,700.00, and, as it had been of record for more than four months, it was absolutely unassailable under the Bankruptcy Act. The First Na-

tional Bank's position was therefore secure as to the greater part of Trathen's debt. It had no occasion to change that position. The debt was due and it could at any moment take possession of the stock. It is of the utmost importance to a correct understanding of the situation to realize the strength of the position of the First National Bank at that time and to view its subsequent action and to judge of its motives from that standpoint.

But Trathen needed more money. This involved a new risk and a readjustment of the security. This the First National Bank refused to do. Application was made to the Stockgrowers Bank, the loan secured and the First National Bank was paid. The only ground on which the decree can be sustained is that in this matter the banks knew or had reasonable ground to believe Trathen was insolvent, and that, therefore, the mortgage to the Stockgrowers Bank constituted a voidable preference.

This involves the application of Section 60-b of the Bankruptcy Act as amended by the Act of June 25, 1910. It is as follows:

"If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby or his agent acting therein shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value for such person. And for the purpose of such recovery any court of bankruptcy as hereinbefore defined and any state

court which would have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction."

In considering the matter, however, it is not just to view the question in the light of subsequent events. As was said in the Lorch case, hereinafter cited, "it would be unfair to charge the Fixture Company with knowing then what all of us know now." Trathen was undoubtedly badly involved at the time of giving the Stockgrowers' Bank mortgage; he was probably insolvent; we can all see that now; *did the banks know or have reasonable cause to believe it then?*

The facts are fully before the Court, and the rule of law with respect to what constitutes knowledge of insolvency or a reasonable cause for such a belief is of course familiar to your Honors, but we wish to call attention briefly to certain cases that state the rule either authoritatively or distinctly. In the case of Sam Z. Lorch & Co. 199 Fed. 944, the Court said:

"As we construe these provisions, a transfer by way of mortgage made by a bankrupt is 'voidable by the trustee,' providing the following facts concur, namely: First, if the transfer is made within four months before the filing of the petition; Second, if the bankrupt is insolvent when the transfer is made; Third, if the effect of the enforcement of the transfer will make any one of the bankrupt's creditors to obtain a greater percentage on his debt than any other creditor of the same class; and fourth, if at the time of the making of the transfer or if at the time it was recorded, the person receiving it, or his agent acting therein had at either of those times reasonable cause to believe the enforcement of the transfer would effect a 'preference'—that is to say that its enforcement would give him a larger percentage on his debt than other creditors would receive. As no greater percentage could be recovered under the transfer if the debtor be solvent and all his debts be paid in full, a creditor cannot be said to have reasonable cause to believe the enforcement of the transfer would effect

a preference unless either at the time the transfer was made or at the time it was recorded he had reasonable cause to believe that his debtor was then insolvent."

The leading case is that of *Grant vs. National Bank*, 97 U. S. 80, where the Court, through Mr. Justice Bradley, said:

"Some confusion exists in the cases as to the meaning of the phrase 'having reasonable cause to believe such a person is insolvent.' Dicta are not wanting which assume that it has the same meaning as if it had read 'having reasonable cause to suspect such a person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the Act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances and yet have no cause for a well grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the Act requires may be wanting. Obtaining additional security or receiving payment of a debt, under such circumstances is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose.

"The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate, and his creditors, if they know anything of his embarrassments, either participate in the same feeling or at least are willing to think that there is a possibility of his succeeding.

To overhaul and set aside all his transactions with his creditors made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through would make the Bankrupt Law an engine of oppression and injustice. It would in fact have the effect of producing bankruptcy in many cases where it might otherwise be avoided."

In *Stucky vs. Masonic Savings Bank*, 108 U. S. 74, in referring to the *Grant* case, Mr. Justice Miller, speaking for the Court, said:

"The whole matter turns upon the question whether, Krieger who acted almost alone for the bank had reasonable ground to believe that Melter was insolvent at the time the mortgages were made. The District Judge who decided that he had such reasonable ground, does not seem to have given due weight to the principles of the case of *Grant vs. National Bank* decided by this court, and reported in 97 U. S. 80, a case which was fully considered and which has since been followed by us as a leading one on the subject.

"That case establishes the doctrine that a creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence may receive payment or security without violating the bankrupt law."

And see

Powell vs. Gate City Bank, 178 Fed. 609.

In re. Eggert, 98 Fed. 843.

In re. Pfaffinger, 154 Fed. 523.

We think the case at bar falls within the rule laid down by these cases and that the evidence shows the officers of both banks believed at the time the Stockgrowers Bank's mortgage was taken that Trathen would be able to "pull through" if helped over a temporary difficulty.

The burden is admittedly upon the trustee here to prove that the banks had reasonable cause to believe Trathen to

be insolvent and having, as we believe, failed to make that proof, no decree could properly be rendered against either defendant.

II.

If your Honors take the view that the First National Bank for some reason wished to make its position more secure and to that end made some undisclosed arrangement with the Stockgrowers Bank whereby the latter made the Trathen loan but really for the other bank, then the situation is this:

The First National is indeed chargeable with the acts of the Stockgrowers Bank and the mortgage taken by that bank would in reality become that of the First National. Thus the First National Bank would not have changed its position through the transaction. Its new mortgage would be a renewal of its old one. But such a renewal is not within the Bankruptcy Act.

The rule is analogous to that relating to an exchange of securities with respect to which, in *Sawyer vs. Turpin*, 91 U. S. 114, the Court said:

"It is too well settled to require discussion, that an exchange of securities within the four months is not a fraudulent preference within the meaning of the bankrupt law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it."

Stewart vs. Platt, 101 U. S. 731.

And see in *re. Reese-Hammond R. B. Co.* 181 Fed. 641.

If it be urged that the Stockgrowers Bank's mortgage secures a larger debt than the older mortgage did, it is replied that this would affect the excess only.

The First National Bank had a mortgage for \$1,700.00

and it received from the Stockgrowers Bank \$2,294.35. The excess is therefore \$594.36, while the decree against the First National Bank is for \$2,465.18, exclusive of interest and costs, a sum nearly two hundred dollars more than the amount it is claimed it received as a preferential payment.

Again, it may be urged that the later mortgage covers some property not included in the first. Doubtless this is true, though it does by no means clearly appear so from the evidence. But the burden was on the trustee to show such facts as would warrant the Court in setting aside the Stockgrowers Bank's mortgage. The testimony of his own witnesses while testifying in his behalf had shown all the facts and circumstances: that the First National Bank held a mortgage on the stock and that the new mortgage was taken on practically the same stock, securing, so far as Trathen was concerned practically the same debt. If the latter mortgage was voidable as to any part of the debt or as to any part of the stock, the burden was on the trustee to show what part that the Court might do justice as among the parties before it.

III.

It was claimed by counsel in the court below that the mortgage to the ~~Stockgrowers Bank~~ ^{First National} was void. Such is not the law nor did the Court below so rule. It is true the mortgage contained no provision for the application of the proceeds of the sales of the mortgaged property upon the debt; but it is also true that the bank took possession of the mortgaged property some time prior to the filing of the petition in bankruptcy. This, under the Idaho decisions, cured any such defect.

Ryan vs. Rogers, 14 Ida. 309.

Dittmore vs. Cable Milling Co. 16 Ida. 298.

Martin vs. Holloway, 16 Ida. 513.

If it be contended that such possession must be taken with the consent of the mortgagor and not in hostility to him and that here the property was seized by the sheriff, it is replied that there is abundant evidence to show that this was done with Trathen's acquiescence rather than otherwise (p. 55). The rule so contended for would doubtless be correct if the mortgage were void as between the parties; then the mortgagee's lien would indeed depend wholly upon his possession secured with the consent of the mortgagor. But where the mortgage is good as between the parties and is void only as to attaching creditors and the like, the necessity for possession on the part of the mortgagee exists only where it is sought to cut off claims about to be made liens upon the property. Possession is not required as against general creditors.

It is true the filing of the petition in bankruptcy upon which an adjudication follows gives, for some purposes, the same rights as an attachment lien, but here the petition was not filed until the property was already in the sheriff's possession. Trathen himself testified that at the time or shortly before the foreclosure proceedings he urged the bank to take possession.

The entire question would seem to be set at rest by the decisions of the Supreme Court of Idaho in the cases cited above.

IV.

It must not be overlooked that the net result of the entire transaction was to leave the debtor's estate in practically the same condition as prior thereto. There had been prac-

tically no diminution of his estate. There was therefore no voidable preference.

National Bank of Newport vs. National H. C. Bank,
225 U. S. 178.

New York C. N. Bank vs Massey, 192 U. S. 138.

Nor must it be forgotten that there is involved in this case no element of fraud. The defendants had a perfect right to take security for the debt due from Trathen. Even had they known he was insolvent at the time, still there was no actual fraud. (Coder vs. Arts, 213 U. S. 223.) The mortgage was good, unless bankruptcy supervened and the transfer was avoided at the suit of the trustee.

We ask that the decree be reversed.

Respectfully submitted,

E. M. WOLFE, .
WYMAN & WYMAN,
Appellants' Solicitors.

— IN THE —

United States Circuit Court
of Appeals

For the Ninth Circuit

STOCKGROWERS' STATE BANK OF MOUNTAIN
HOME, a Corporation, and THE FIRST NA-
TIONAL BANK OF MOUNTAIN HOME, a Cor-
poration,

Appellants

vs.

CHARLES E. CORKER, Trustee of the Estate of
Thomas Trathen, a Bankrupt,

Appellee.

APPELLEE'S BRIEF

*Upon appeal from the United States District Court for the
District of Idaho, Southern Division*

HARRY S. KESSLER,

W. C. HOWIE,

Appellee's Solicitors.

Filed

SEP 26 1914

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STATEMENT OF THE CASE.

This action was instituted by appellee as trustee in bankruptcy to recover from the appellants for the benefit of creditors of the bankrupt estate the possession of, or in lieu thereof, the value of the stock of furniture and the notes and accounts which constituted the entire estate of one Thomas Trathen, the bankrupt. The trial Court, af-

ter hearing the evidence, entered its decree (p. 23) to the effect that the chattel mortgage and the foreclosure proceedings thereunder taken by the Stockgrowers State Bank, one of the appellants, created a voidable preference, and ordered the defendant to redeliver the property to the plaintiff within twenty days of the date of the decree, and if it should not be so re-delivered that plaintiff should have judgment therefore in the sum of \$2465.18, which was found to be the value of the property.

We agree with counsel for appellant in their statement that "there is no serious dispute as to the facts," but a fuller statement of the facts than set forth in their brief will mar the picture of innocence that their narration of the transaction portrays.

Mountain Home, Idaho, the place where the events occurred that led to this controversy, is a country town in which there was located at that time but two furniture stores and two banks. These two banks, the appellants here, seemed to have caught the financial spirit of the age. R. B. Chattin, president of the First National Bank, was a director in the Stockgrowers Bank. Will T. Montgomery, assistant cashier of the First National Bank, was also a director in the Stockgrowers Bank, and R. W. Smith, the vice president of the Stockgrowers Bank, was an active stockholder, although not an officer, in the First National Bank, and Mr. L. B. Green was the attorney for both banks. The particular activity of these four men throughout the transaction, as disclosed by the evidence, should be noted.

Mr. Trathen, the bankrupt, had been in the furniture business at Mountain Home for a number of years and

had been doing his banking with the First National Bank prior to July 13th, 1911. The other furniture store, to-wit, the Thompson Furniture Company, of which Mr. G. W. Herder was manager had been doing its banking business with the Stockgrowers Bank prior to July 13th, 1911. Both of these furniture houses were rather heavily indebted to their respective banks. Mr. Trathen owed the First National two notes, one for Seventeen Hundred Dollars (\$1700), very doubtfully secured, and one for Five Hundred Dollars (\$500), and there was some accrued interest on both. The Thompson Furniture Co. was indebted to the Stockgrowers State Bank on an unsecured note for \$3400.00, and interest, besides a little overdraft. Business conditions with Mr. Trathen were not satisfactory at that time, and Mr. E. M. Wolfe, another attorney of the town, received for collection from certain creditors of Mr. Trathen various claims, which amounted to something over \$800.00. Mr. Wolfe was pressing these claims for collection and Mr. Trathen, in order to satisfy the demands of Mr. Wolfe, went to his bank, the First National, and applied for an additional loan. Mr. Austin, cashier of the First National Bank testified as follows (pp. 31-32):

"He wanted more money to take up some of these sight drafts to put his business in better condition. *

* * In a general way I discussed with the officers and directors of my bank the fact that Trathen wanted more money and merely in a general way called attention to the facts these drafts were out. Mr. Chatin was one of the directors to whom I spoke. I considered the Trathen account unsatisfactory because I had made demands for accrued interest and it was not forthcoming. I imagine I had investigated his assets and knew practically what they consisted of. I pre-

sume I advised the board of directors as to what his property consisted of, though I cannot say positively."

Mr. L. B. Green, the attorney for both banks, in testifying as to what occurred after Mr. Trathen made his application for an additional loan, said (p. 47):

"There was a meeting of the directors of the First National and Mr. Chattin phoned me to come down and I think instructed me to prepare notes and mortgages to include the Trathen debt at that bank and some debts Mr. Wolfe had. I went with Mr. Trathen to get the amount of these debts when the cashier told me I need not draw the papers, and I did not. I think Mr. Chattin was the next one who spoke to me about the matter. He said he was trying to get the loan for Trathen at the Stockgrowers' State Bank, and it may have been three or four days after that when he told me to draw the papers for the Stockgrowers State Bank and to cover the amount of the debts Wolfe had and that held by the First National."

It thus appears that the First National Bank had decided to make the additional loan and instructed its attorney to prepare the papers and then afterwards fell upon a new plan. For some reason not explained, and after several days of deliberation, the unique plan was evolved of switching the accounts of the two furniture houses. Accordingly, in the language of Mr. Herder, the manager of the Thompson Furniture Co. (pp. 32-33):

"The Stockgrowers Bank called the loan and I got the money from the other bank to pay them by a loan secured by a mortgage. I did not have the ready money to meet the Stockgrowers' loan, and in looking around for another loan, Mr. Montgomery suggested that I might, or could, get it from the First National Bank, and I took it up with Montgomery and

Chattin and the bank gave me the loan. I gave additional security and the Stockgrowers' loan was paid that way. Mr. Montgomery suggested to me that I could get this loan in my place of business, and then I met Montgomery and Chattin and one or two other officers of the bank. I was called in by them after I had been talking with Montgomery. Montgomery, Chattin and Ake were in there part of the time, and also Roscoe Smith. Montgomery did most of the talking, stating that the Stockgrowers wanted the loan paid and that the First National would give me the money. Mr. Smith informed me that they could not any longer carry me. * * * I believe Chattin and Montgomery did the talking principally. * * * Montgomery was the first man who suggested my getting the loan at the First National Bank."

It thus appears that the Thompson Furniture Co., although in no particular financial difficulty, was notified that it must settle its account with the Stockgrowers State Bank, and concurrently with this demand was the suggestion that the First National Bank would supply its needs. Mr. Trathen in turn was notified that his application for an additional loan made at the First National Bank had been denied, but he was also notified at the same time that the Stockgrowers Bank would furnish him the necessary money. Mr. Trathen did not make application for a loan to the Stockgrowers State Bank. As a result of this pre-arranged plan, carried out principally by the three men above named, that were jointly active in both banks, and Mr. Green, the attorney for the two banks, the necessary papers were drawn and notes and chattel mortgages were executed by both furniture houses to the respective banks designated by the jointly interested committee. Each furniture house gave its new note secured by a chat-

tel mortgage on its entire assets to its new involuntarily selected bank. These papers were all executed on July 13th, 1911. It appears, however, that the accounts were not transferred on the books of the banks until about three weeks later, but nevertheless the switch was made on the same day, to-wit, August 5th, 1911.

It also appears that over two years before this eventful 13th day of July, 1911, Mr. Trathen borrowed \$1700.00 from the First National Bank, furnished two endorsers, to-wit: W. D. Evans and John Owens. These endorsers, to secure themselves, in April, 1909, took a mortgage on the Trathen stock of furniture. This mortgage was never renewed and no steps were ever taken by the mortgagees to exercise any rights under it. But on the 13th day of June, just one month prior to the interesting transaction of July 13th, this mortgage for some peculiar reason was assigned by the mortgagees to the First National Bank (testimony of Mr. Trathen, p. 39). This is significant, as suggesting that there was some contemplation of financial difficulty at that time. Furthermore, Mr. Trathen, during the several years that he was banking at the First National Bank had furnished various statements in writing of his financial condition. The last statement that appellants introduced enumerating his assets and liabilities was given January 12th, 1910 (p. 42). Earlier statements are set forth on pages 49 and 50. Mr. Trathen testified (p. 39):

"I don't know as any exact inventory was taken at the time of giving the mortgage. I think somewhere about a month or two before that time I did make a statement to the bank as nearly as I can get at it as to what the inventory did amount to."

If this statement referred to by Mr. Trathen was in writing it was not produced, for some reason, by appellants. It will be noted that the three statements introduced by appellants do not materially differ. They all show that the home was too heavily mortgaged to be available as an asset. The furniture, valued at \$2000.00 and \$2200.00, was exempt, and the merchandise indebtedness was 50 per cent of the inventory, which to an experienced business man is known to be about the full value of an old stock. The only other assets listed are the Sunnyside water right and the Great Western note and some book accounts. The Great Western notes were conditional upon the completion of the segregation of an irrigation project, which was an apparent failure long before July, 1911 (pp. 43-44). The desert entry and water rights thereunder never had any other than a speculative value. (See testimony of Mr. Norrell, pp. 45-46). The officers in both banks were acquainted with the fact that Mr. Wolfe had a list of accounts and was pressing them for collection. The note and mortgage given to the Stockholders State Bank covered not only the amount Trathen was owing the First National Bank, but also the amount of Mr. Wolfe's accounts. Mr. Wolfe receipted the accounts, although he never received anything for his clients.

After this mortgage was given, Mr. Trathen kept the store open and made daily sales and purchases in the ordinary course of business, but never at any time accounted to the mortgagee for such daily sales as required by the mortgage. About sixty days after this mortgage was given, the Stockgrowers Bank proceeded to foreclose, and on October 2d the sheriff sold the stock and the Stock-

growers State Bank bid it in for \$2465.18, the inventory value. On October 23d following, Mr. Trathen was adjudged a bankrupt, and the appellee, Mr. Corker, was elected trustee. He made demand for the possession of this stock. The Stockgrowers State Bank referred him to their attorney, Mr. Green, and when he saw Mr. Green regarding it, he was advised that the bank had the property storing it, "waiting for somebody to raise a rough house" (p. 29). It clearly appears that Mr. Trathen was bankrupt on and for a considerable time prior to July 13th and that there are no assets available for other creditors of the bankrupt estate unless the execution sale is set aside.

RECORD CORRECTED.

The error in printing the record originally referred to on page 8 of the appellant's brief, has been corrected by reprinting pages 29, 30, 30a and 30b, and eliminating pages 51 and 52 of the record as originally printed.

ARGUMENT.

Counsel for appellant seem to base their claim for a reversal of the judgment largely on the ground that the First National Bank was secured at least to the extent of \$1700.00 through their right of subrogation under the Evans and Owens mortgage, which was executed in April, 1909. Our reply, however, is that that mortgage was of no value as security to the First National Bank for two reasons. In the first place, this mortgage was executed two years and three months prior to July 13th, 1911, on a stock of merchandise that was being disposed of daily, in

the ordinary course of business, and being replenished as necessary from time to time to keep the stock at its normal value. The mortgage did not and could not have legally covered the after acquired stock. There is nothing in the evidence to show what portion of the stock originally mortgaged remained in the store on July 13th, and there is no apparent way by which the mortgagees or the First National Bank could have selected the original stock if any remained, so that Evans and Owens in fact had no security on the date in question (*Ryan vs. Rogers*, 14 Idaho, 309, 94 Pac. 427). And secondly, the Evans and Owens mortgage made no provision for the application of the proceeds of the sales to the mortgage indebtedness, and was therefore void as to creditors. It is probably true as between the mortgagor and the mortgagee such a mortgage was valid as to such stock that it actually covered, and such mortgage might have become valid as against creditors by the taking possession by the mortgagees. But possession under that mortgage was never at any time taken, so that so far as the rights of creditors are concerned that old mortgage never was of any force and effect and never became a lien superior to or ahead of the rights of other creditors. We, therefore, submit that when counsel declare that the strength of the position of the First National Bank is based on this mortgage they have, indeed, laid their foundation on shifting sand. The rights under this mortgage must be determined by the laws of the State of Idaho, and the case of *Ryan vs. Rogers*, *supra*, we believe thoroughly disposes of their contention in that regard. It will be noted that in the case just cited a trustee in bankruptcy was the plaintiff in the action against the

sheriff, who was holding the stock of merchandise by virtue of possession secured under a chattel mortgage. In the opinion on re-hearing, Justice Sullivan, in quoting from the Supreme Court of Montana in reference to a mortgage on a stock of merchandise which was being sold in the ordinary course of business long after maturity, said that a mortgage under such facts and circumstances "becomes a mere sham, a mere appearance, a delusion asserting in form what is not a fact." We would suggest to counsel in their own language, that it is of the utmost importance to a correct understanding of the situation to realize the *weakness* of the position of the First National Bank at that time, and to view its subsequent action and to judge its motives from that standpoint. The fact that the bank took an assignment of this old mortgage on June 13th, 1911, forcibly suggests that possibly they intended to exercise for their protection some contemplated right of possession thereunder which they later concluded to be worthless.

We wish to correct counsel's statement on page 10 of their brief that application was made to the Stockgrowers Bank. The record discloses that Mr. Trathen made application only to the First National Bank for the additional loan and went into detail with that bank as to his finances, and in his own words, this is what happened (p. 53):

"I think two or three days afterwards Green notified me that I was wanted at the Stockgrowers State and I went there, but they were busy and did not want me just then. They notified me that Mr. Green would attend to the business, and the loan would be granted and the Stockgrowers State Bank would take up the

mortgage in place of the—and take up the First National account.”

REASONABLE CAUSE TO BELIEVE

We have no quarrel with the authorities cited by counsel defining what is meant by “reasonable cause to believe” as used in Section 60-b of the Bankruptcy Act as amended by the Act of June 25th, 1910, except that the cases cited omit the one feature of the rule that is particularly applicable to the facts in this case. I refer to the idea of constructive notice. Loveland on Bankruptcy, Section 508, page 1010, states the law thus:

“Constructive notice is sufficient, upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry as to the facts is a moral duty and diligence an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice where the means of knowledge are at hand and if the party under such circumstances omits to inquire and proceeds to receive the transfer or conveyance, he does so at his peril, as he is chargeable of knowledge and of all the facts which by a proper inquiry he might have ascertained * * * The plea of ignorance on the part of the creditor will not relieve him of liability when a small amount of inquiry would have given all the necessary information.”

Or, as stated by the Supreme Court of Minnesota in the case of Galbraith vs. Whitaker, 119 Minn. 447, 138 N. W. 772, 43 L. R. A. (N. S.) 427:

“The rule is that facts which are sufficient to put an ordinarily prudent man upon inquiry as to his debtor’s solvency charge such person, when they come to his notice, with all the knowledge he could have acquired

by the exercise of reasonable diligence. *McElvain v. Hardesty*, 94 C. C. A. 399, 169 Fed. 31."

"A creditor who receives a transfer from a bankrupt with knowledge that he was unable to pay his debts and had abandoned his business is chargeable with knowledge of all the facts which by a proper inquiry he might have ascertained."

Russell's Trustee vs. Mayfield Lbr. Co. Ky. Court of Appeals, March, 1914). 32 Am. B. R. 357.

"It is sufficient if the circumstances are such as would lead an ordinary man to the conclusion that his debtor is insolvent."

Rogers vs. American Halibut Co. (Mass. Sup. Jud. Ct.) 31 Am. B. R. 576.

See also *Batchilder vs. Home National Bank of Milford*. (Mass. Sup. Jud. Ct. June, 1914) 32 Am. B. R. 555.

"The Circuit Court of Appeals will not disturb a judgment of the District Court unless it is overborne by the clear weight of the evidence as disclosed by the record."

Carey vs. Donahue (U. S. Circuit Ct. of Appeals Sixth Circuit) 31 Am. B. R. 210; 209 Fed. Rep. 328.

See also *Eau Claire Nat. Bank vs. Jackman*, 204 U. S. 522, 51 Law. Ed. 596.

We urge that the appellants in this case when the mortgage was executed on July 13th, 1911, not only had reasonable cause to believe that the defendant was insolvent and that this mortgage would give them a greater percentage on their debt than other creditors, but also that the only reasonable conclusion from the evidence is that

they positively knew that Mr. Trathen was insolvent and that this transfer would act as a preference. It must be born in mind that the original \$1700.00 loan had been carried twenty-seven months and had not only not been reduced, but an additional \$500.00 had been borrowed. The cashier had made demands for interest that had not been met. The bank had kept itself posted as to Trathen's financial conditions by repeated statements. According to Mr. Trathen, one of these was furnished only a month or two before the date in question. It does not appear that any of these statements were false except as to the estimated value placed on the several assets enumerated. The officers of the bank must have known the actual value of the several items specified. Referring to the statement of January 1st, 1910, as business men, they knew that the stock of furniture was actually not worth near the inventoried value. The figures show that the house was encumbered for practically all it was worth, and living in a small town, the bank undoubtedly knew that one of the mortgages on the house had been foreclosed and that it had been sold by the sheriff under foreclosure on April 7th, 1911. They knew the value of the two lots listed and may or may not have known that the title was imperfect. They knew the household furniture was exempt and could not be considered as an asset. They must have known the Great Western Sugar Co. note was valueless and that the Sunnyside project, under which the water rights were listed, was defunct. They knew that Trathen was owing them about \$2300.00 and that Mr. Wolfe had \$800.00 in claims, so if they made any calculation as to the assets and liabilities they could not have determined oth-

erwise than that Mr. Trathen was insolvent. That they had made such calculation must be assumed when they were interested to the extent of \$2300.00 and without security. That they were worried about the position they were in is indicated by the fact that they secured an assignment of the Evans and Owens worthless mortgage only a month before. That drafts were coming in for payment of merchandise and were not being honored and that Attorney Wolfe was demanding payment of various claims which Mr. Trathen could not meet must have excited their interest, and when an application was made for a further loan to meet these demands as reasonable business men they could not have done otherwise than to make a sufficient investigation to become acquainted with the actual condition. In fact, Mr. Austin, the cashier of the First National Bank, hesitatingly admitted (p. 32):

"I imagine I had investigated his assets and knew practically what they consisted of. I presume I advised the board of directors as to what his property consisted of, though I cannot say positively."

Mr. Chattin is particularly named as one of the several directors to whom Mr. Austin spoke about the drafts being out, and the unsatisfactory condition of the account. So we submit that these directors of the First National Bank knew of the insolvency of Mr. Trathen or at least if they didn't know it in fact they were acquainted with sufficient facts to put any reasonably prudent body of men on inquiry.

Furthermore, if they didn't know the actual conditions or have reasonable cause to believe that Trathen was insolvent, why did they switch the accounts of the two fur-

niture houses That was an act most unusual. It certainly was not done except for a purpose, and appellants certainly make no satisfactory explanation. The reasonable inference must be that they thought by doing so the loan of the Stockgrowers Bank might be classed as an advance for a present consideration rather than as a settlement of a pre-existing debt. Then there is another significant fact. After the foreclosure proceedings, the Stockgrowers State Bank did not attempt to convert their purchase into cash, but held the stock, and when served with notice by the trustee, their attorney promptly replied that "they had the property up there storing it waiting for some one to raise a rough house." Thus indicating that they had deliberately, but not with much confidence, attempted to fortify themselves and were expecting an attack from the trustee.

II.

In the second division of counsel's argument, they suggest that even if your Honors should conclude that there was collusion between the banks yet even in that event the Stockgrowers Bank would in reality become the agent of the First National and that this new mortgage would, therefore, be but a renewal of the old Evans and Owens mortgage. This is a most unusual position, indeed. They urge that even if you should find that these two banks conspired together to defraud the creditors and failed in their effort to defraud that nevertheless the Court would come to the rescue of the guilty parties and protect them by restoring them to the position held before the fraud was attempted. The further answer to this contention is the one pointed out in the beginning of our argument that

this old mortgage was worthless as security; first, because the stock originally mortgaged had largely been disposed of in the course of business, and, second, because the mortgage was void as to creditors in not making provision for the application of the proceeds to the mortgage indebtedness.

III.

The contention urged in part three of counsel's argument has, we believe, been clearly disposed of in the first paragraphs of this argument. They seem to intimate that because the property had been seized by the sheriff that such possession cured the defect in the mortgage and shut out the rights of creditors. That might be true in the case of an attachment under the State law, but not so in bankruptcy. The very purpose of Section 60-b is to enable creditors to set aside all such liens or transfers made within four months.

IV.

Their final contention is there was practically no diminution of the estate by giving the mortgage, and therefore no voidable preference. This contention is based on an erroneous premise that the original Evans and Owens mortgage covered the after acquired stock and was a valid lien on the entire stock of merchandise as it existed on July 13th, 1911. We have herein already several times pointed out, that that position is clearly untenable. We, therefore, ask that the decree be affirmed.

Respectfully submitted,

W. C. HOWIE,
HARRY S. KESSLER,

Appellee's Solicitors.

18
No. 2375

United States
Circuit Court of Appeals
For the Ninth Circuit.

GENERAL ELECTRIC COMPANY, a Corporation,

Petitioner,

vs.

C. A. BROWER, Trustee in Bankruptcy of
the Estate of ANDRUS-CUSHING
LIGHTING FIXTURE COMPANY,
a Corporation, Bankrupt,

Respondent.

In the Matter of ANDRUS-CUSHING LIGHTING
FIXTURE COMPANY, a Corporation,
Bankrupt.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, of a Certain Order of the United
States District Court for the West-
ern District of Washington,
Southern Division.

FILED

MAR 6 - 1914

United States
Circuit Court of Appeals
For the Ninth Circuit.

GENERAL ELECTRIC COMPANY, a Corporation,

Petitioner,

vs.

C. A. BROWER, Trustee in Bankruptcy of
the Estate of ANDRUS-CUSHING
LIGHTING FIXTURE COMPANY,
a Corporation, Bankrupt,

Respondent.

In the Matter of ANDRUS-CUSHING LIGHTING
FIXTURE COMPANY, a Corporation,
Bankrupt.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, of a Certain Order of the United
States District Court for the West-
ern District of Washington,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

FRANK H. KELLEY, Esquire, #717 Tacoma Building, Tacoma, Washington, and

RALPH WOODS, Esquire, #717 Tacoma Building, Tacoma, Washington,

DOLPH, MALLORY, SIMON & GEARIN, Lawyers, Portland, Oregon,

Attorneys for Petitioner.

WALTER M. HARVEY, Esquire, #1307 National Realty Building, Tacoma, Washington,

G. C. NOLTE, Esquire, Tacoma Building, Tacoma, Washington,

Attorneys for C. A. Brower, Trustee in Bankruptcy of the Bankruptcy Estate of Andrus-Cushing Lighting Fixture Company. [2*]

In the United States District Court for the Western District of Washington, Southern Division.

No. 1398.

In the Matter of ANDRUS-CUSHING LIGHT-
ING FIXTURE CO.,

Bankrupt.

Stipulation for Record on Petition for Review.

IT IS HEREBY STIPULATED AND AGREED by and between counsel herein that the record on review in this matter shall constitute the following

*Page-number appearing at foot of page of original certified Record.

papers and none other, and that the Clerk in preparing the record shall omit all captions, endorsements, acceptances of service, verifications, etc. excepting file marks.

1. Petition of Banner Electric Company;
2. Objections to confirmation of sale, etc.;
3. Order confirming sale;
4. Petition for review of Referee's order;
5. Referee's certificate on review;
6. Order confirming Referee's decision;
7. Petition for review by U. S. Circuit Court of Appeals, and allowance;
8. This stipulation.

FRANK H. KELLEY and
RALPH WOODS,

Attorneys for Petitioner.

WALTER M. HARVEY,
Attorney for Trustee in Bankruptcy.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 2, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [3]

Petition [That Lamp Stock be Withheld from Sale, etc.].

Comes now the Banner Electric Works of the General Electric Company, a corporation, by Ralph Woods, its attorney, and respectfully shows to the Court:

I.

That at the time of the filing of the petition in bankruptcy in the above entitled proceedings, your

petitioner was the owner of lamp stock of the value of six hundred and nineteen and 73/100 (\$619.73) dollars, which said lamp stock is in the possession of the trustee in Bankruptcy and which stock has at all times been kept separate and segregated from the stock of the said bankrupt.

II.

For a complete list of the stock of your petitioner, reference is hereby made to the first report of the Trustee, on page seven.

WHEREFORE, your petitioner prays that said lamp stock be withheld from sale and upon a hearing the same be forthwith delivered to your petitioner.

BANNER ELECTRIC WORKS,
By RALPH WOODS,

Its Attorney.

[Endorsed]: "Filed this 8 day of October, 1913, at 10:00 A. M. R. F. Laffoon, Referee in Bankruptcy."

[4]

Objections to the Confirmation of the Sale of the Banner Electric Stock.

Comes now the Banner Electric Works of the General Electric Company, by Ralph Woods, and Frank H. Kelley, its attorneys, and objects to the confirmation of the sale of what is known as the Banner Electric stock, and shows to the Court as follows:

I.

That your petitioner has filed herewith claim for what is known as the Banner Electric stock; that notice was given to purchaser at the time of the sale; that no action was taken by the Court at said time.

II.

That no appraisement was made of said goods and the property was sold without proper notice; that at the time of said sale the Referee states that the same would be sold subject to confirmation.

III.

Your petitioner further shows that said goods belonging to your petitioner were held by the bankrupt merely as agent for your petitioner; that what is known as the Banner Electric stock was at all times segregated and kept separate from the main stock of the said bankrupt.

IV.

That your petitioner at all times while said stock was in the store of the said bankrupt was insured against fire and against burglars and said insurance was paid by your petitioner. [5]

V.

That the taxes on the same were paid by your petitioner.

VI.

That the first report of the Trustee shows that the stock of your petitioner was kept separate and segregated from the main stock, and your petitioner hereby refers to the first report of the Trustee for correct list of said stock.

VII.

That the following is a copy of the contract entered into by your petitioner and the said bankrupt, to wit:

“APPOINTMENT OF AGENT.

INCANDESCENT LAMPS.

“The General Electric Company, a New York cor-

poration (hereinafter called the 'Manufacturer'), hereby through the General Manager of its Banner Electric Works, at Youngstown, Ohio, appoints Andrus-Cushing Lighting Fixture Company (hereinafter called the 'Agent'), an agent to sell for it its Banner incandescent lamps, manufactured under United States Letter Patent, of the types and classes hereinafter specified upon the terms and subject to the conditions herein set forth and said Agent hereby accepts the appointment, and agrees to comply with said terms and to perform all conditions hereof.

"1. The Agency hereby created shall continue for the period of one year from July 1, 1912, unless sooner terminated as herein provided.

"2. The Manufacturer agrees to maintain in the custody of the Agent, to be disposed of as herein provided, a stock of its Banner Gem (metalized filament), Mazda (Tungsten) and Tantalum patented incandescent lamps; all of the lamps in such consigned stock shall be and remain in the property of the Manufacturer until the lamps are sold, and the proceeds of all lamps sold shall be held for the benefit and for the account of the Manufacturer until fully accounted for as hereinafter provided. The quantity of lamps and the length of time they shall remain in stock is to be at all times determined by the Manufacturer; but its intent is to maintain the stock on an average basis of from 30 to 60 days' supply, as estimated by the Agent. All lamps shipped hereunder by or on behalf of the Manufacturer either to the Agent or upon his request during the continuance of this Agency, shall be subject to

the same terms, conditions and agreements as if shipped to said stock, whether or not so specified. The Agent shall return to the Manufacturer, at any time when directed by it, all or any part of the said lamps that have not been sold, and any duly authorized representative of the Manufacturer shall have access at all times during business hours to the place or places in which said lamps are stored. [6]

“3. The Agent is hereby authorized (a) to sell to anyone, lamps from said stock in broken package quantities at broken package prices, and in standard package quantities at standard package prices, and (b) to sell lamps from said stock to any purchaser under standard forms of contract made by the Manufacturer and under which the Agent may be given, by the Manufacturer, written authority to deliver lamps at the prices fixed in said contracts, and (c) to sell, at prices on the same basis as those in standard forms of contract, lamps from said stock to any purchaser, not under contract, for the purchaser's immediate use; but sales under this subdivision (c) may be made only on written permission from the Manufacturer first obtained in each instance. All sales shall be made only at such prices and upon such terms as may be established by the Manufacturer; the present prices and terms being contained in the schedules presented herewith, which are subject to change on written notice from the Manufacturer from time to time.

“Upon all bills and invoices for lamps sold by the Agent shall appear the words: ‘Agent for Banner Incandescent Lamps of General Electric Company.’

The Agent has no authority to sell or transfer or in any way dispose of such lamps, except as herein expressly provided, and shall not control, or attempt to control, the prices at which any purchaser shall sell any of such lamps. The due payment to the Manufacturer for all sales made hereunder by the Agent shall be and hereby is Guaranteed by said Agent.

“The Agent shall conform to the educational and engineering instructions of the Manufacturer, and shall advise with and instruct prospective purchasers as to the classes and types of lamps best suited to their several requirements in order to secure a maximum illumination for a minimum expenditure and shall conduct the business hereunder to the satisfaction of the Manufacturer.

“4. All of the Agent’s books and records relating to his transactions in connection with the sale and distribution of the Manufacturer’s lamps shall at all times during business hours be open to the inspection of any duly authorized representative of the Manufacturer.

“5. The Agent shall pay all expenses in the storage, cartage, transportation, handling and sale of lamps hereunder, and all expense incident thereto and to the accounting and collection of accounts thus created. The Agent shall be allowed as compensation for the performance of all obligations hereunder, the difference between the amount received from the sale of the lamps and their value on the basis of a discount of — per cent from list prices as at the time fixed by the Manufacturer. The Manufacturer agrees that if the Agent sells during the period of

this appointment, a quantity of lamps the value of which would entitle him to a higher basis of compensation, as shown in Schedules presented herewith, the Manufacturer will at once credit the Agent with an amount equal to the difference between the compensation he has been receiving and the compensation he then becomes entitled to.

“6. The Agent shall render to the Manufacturer, not later than the tenth of every month, a report, on forms provided by the Manufacturer, covering his sales of the Manufacturer’s lamps during the preceding calendar month.

“The Agent shall pay over to the Manufacturer, not later than the tenth of every month, an amount equal to the [7] total sales value of all lamps sold hereunder, less the compensation due the Agent, for which collections have been made by the Agent during the preceding calendar month, and a further amount equal to the total sales value less the compensation due the Agent, on all lamps sold by the Agent to customers whose accounts covering such lamps are, on the first of the month, past due, according to the Manufacturer’s standard terms of payment.

“If reports are forwarded as provided in this clause, and are accompanied by a remittance covering in full the lamps sold by the Agent during the preceding calendar month, whether or not such accounts have been collected, such remittance may be the total sales of the lamps sold, less the compensation due the Agent, and less 5 per cent of the amount so arrived at, which 5 per cent shall be allowed as an

additional compensation for such payment and service.

“7. The Agent shall, on or before the 15th day of January and July, make and forward to the Manufacturer, on forms provided by the Manufacturer, a complete itemized report or inventory of all of the Manufacturer’s lamps on hand at the close of business on the last day of the preceding calendar month and shall render a similar report within 15 days after the termination or expiration of this appointment with reference to all such lamps on hand at the date of such expiration or termination. At the time for rendering each such report, the Agent shall pay to the Manufacturer the value of all lamps lost from the aforesaid stock or damaged, on the basis of list prices, less a discount of 29 per cent.

“8. The Agency hereby created may be terminated by notice in writing to the Agent in the event that the Agent Shall be or become insolvent or in the event of a breach by the Agent of any of the terms or conditions of this appointment. The expiration or termination of this Agency for any reason shall be without prejudice to the rights of the Manufacturer against the Agent, and immediately upon any such expiration or termination the Agent shall deliver to the Manufacturer all lamps consigned hereunder and that remain unsold and shall fully perform all obligations of the Agent that then remain unfulfilled.

“This appointment is hereby signed for the General Electric Company, the Manufacturer, by the General Manager of its Banner Electric Works or his duly authorized representative located in the sales

office of its said works at Youngstown, Ohio.

“L. N. NORRIS,

“General Manager Banner Electric Works.

“Accepted:

“ANDRUS-CUSHING LIGHTING FIXTURE
COMPANY.

“Agent.”

(Verification.)

Filed this 15 day of Oct., 1913, 10 A. M. R. F.
Laffoon, Referee in Bankruptcy. [8]

Order [of Referee] Confirming Sale.

This cause coming on regularly to be heard on the 15th day of October, 1913, at the hour of 10 o'clock A. M. of said day, pursuant to the due and regular adjournment of the creditor's meeting held on the 11th day of October, 1913, upon the report of the trustee, of the sale of personal property of the bankrupt herein, and it appearing to the Court that due notice was given of the time and place of said sale as required by the laws of the United States and the order of this Court, and that said sale was conducted regularly in all respects, and that at said sale J. G. Parkhurst was the highest and best bidder for the personal property of said bankrupt and bid therefor the sum of \$3,600 in cash, the said property including all of the property of said bankrupt, except the book accounts and the personal property claimed by the Banner Electric Company as consigned goods, and
IT FURTHER APPEARING TO THE COURT,
that the said J. G. Parkhurst bid for the said prop-

erty claimed by the said Banner Electric Company as consigned goods, the sum of \$210.00, and that said bid was the highest and best bid therefor, and

This cause coming on further to be heard on said 15th day of October, 1913, upon the petition of the said Banner Electric Company, praying that the said consigned goods be by order of this Court, turned over to the possession of said Banner Electric Company as the property of said Banner Electric Company, the Court having heard the evidence presented in support of said petition and having heard the argument of counsel and being fully advised in the premises,

IT IS HEREBY ORDERED, that said petition of the said Banner Electric Company aforesaid be and the same is hereby [9] denied and overruled, to which order the said Banner Electric Company by its counsel duly excepted and its exception is allowed,

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED, that the sale of all of the personal property of said bankrupt corporation with the exception of the book accounts and the consigned goods aforesaid to J. G. Parkhurst for the sum of \$3,600.00 be and the same is hereby ratified, approved and confirmed and the trustee in bankruptcy herein, is hereby directed to forthwith deliver possession of said *personal* to the said John G. Parkhurst upon receiving from him the sum of \$3,600.00 in cash.

IT IS FURTHER HEREBY ORDERED THAT THE SALE OF THE CONSIGNED GOODS claimed by the Banner Electric Company to J. G.

Parkhurst for the sum of \$210.00 be and the same is hereby ratified, approved and confirmed, but the said trustee in bankruptcy is hereby directed to retain possession of said goods claimed by the said Banner Electric Company for the period of five days from and after the 15th day of October, 1913, which time is hereby allowed the said Banner Electric Company to file a petition for review before the district Judge of said District.

Done in open court this 15th day of October 1913.

R. F. LAFFOON,

Referee in Bankruptcy.

[Endorsed]: "Filed this 17 day of Oct., 1913, at 10:00 A. M. R. F. Laffoon, Referee in Bankruptcy."

[10]

Petition for Review of Referee's Order.

To the Honorable R. F. LAFFOON, Referee in Bankruptcy:

Comes now the Banner Electric Works of the General Electric Company and respectfully shows:

I.

That heretofore prior to the sale of the stock belonging to the said bankrupt, your petitioner filed a petition with the Referee asking for the return and the possession of about six hundred nineteen and 73/100 (\$619.73) Dollars worth of lamp stock belonging to your petitioner, which said stock was held by the bankrupt as agent, a copy of the contract of agency which is marked Trustee's Exhibit No. 1.

II.

That thereafter said stock was sold by the trustee

subject to the confirmation thereof for the sum of two hundred ten (\$210.00) dollars.

III.

That your petitioner objected to the confirmation thereof and reference is hereby made to the said petition.

IV.

That said sale of the trustee was confirmed by the Referee on the 15th day of October, 1913.

V.

That the Referee in Bankruptcy erred in the following manner:

1. In permitting a sale of the stock without an appraisement.

2. In construing the contract of appointment of agent, Exhibit No. 1, as a conditional sale instead of a bailment, [11] and thereby confirming the sale and in ruling that such a contract, in order to protect the manufacturer, must be recorded with the Auditor within ten days after such appointment.

3. In refusing an order allowing your petitioner the immediate possession of said Banner Electric stock.

WHEREFORE, your petitioner, feeling aggrieved because of such orders, prays that the same may be reviewed as provided in the Bankruptcy Law of 1898 and General Order XXVII.

Dated this 15th day of October, 1913.

BANNER ELECTRIC WORKS OF THE
GENERAL ELECTRIC COMPANY,

Petitioner.

By RALPH WOODS,
Attorney for Petitioner.

“Filed this 15 of Oct., 1913, 2 P. M. R. F. Laffoon, Referee in Bankruptcy.” [12]

[Certificate of Referee on Petition for Review.]

To the Honorable EDWARD E. CUSHMAN, U. S.
District Judge.

I, R. F. Laffoon, the Referee in Bankruptcy in charge of this proceeding, do hereby certify:

That, in the course of such proceeding, an order a copy of which is annexed to the petition hereinafter referred to, was made and entered on the 17th day of October, A. D. 1913.

That, on the 15th day of October, 1913, the Banner Electric Works, a claimant in this cause, feeling aggrieved thereat, upon the ruling of the referee and in anticipation of the order, filed its petition for review of the aforesaid order herein, which was granted.

That a summary of the evidence on which such order was based is as follows: The claimant, the Banner Electric Works, by its petition claimed the return of certain lamp stock in the possession of the trustee of the value of \$619.73, to which petition the trustee filed objections and exceptions, to wit:

I.

That the transaction between the Banner Electric Company and the bankrupt was a sale of the said stock to the bankrupt corporation.

II.

That the transaction between the Banner Electric Company and the bankrupt is not an absolute sale

was a conditional sale and void as to creditors for the reason that the same was not recorded in the manner and form provided by the law of the State of Washington. [13]

III.

That the title of the said goods under the law and the facts in this case is in the trustee in bankruptcy for the benefit of all the creditors of the bankrupt.

IV.

That the Banner Electric Company has treated said transaction as a sale and has filed a general claim setting forth that it is a creditor to the extent of the purchase price of said goods, and that the said petitioner is now estopped from claiming that the title of the said property did not pass to the said trustee.

Upon the hearing of the petition on motion of counsel for the petitioner, the Banner Electric Company, was allowed to amend its proof of claim filed herein, in such manner as to exclude any of the lamp stock claimed in its petition, if its proof in fact included any of that stock, and so disposed of the trustee's fourth exception herein, and the hearing was had upon the trustee's exceptions 1, 2 and 3.

Upon the examination of Mr. Andrus, president of the bankrupt company, at page 6 of the transcript of the testimony, it appears that the Banner Electric Company filed its proof of claim herein, claiming \$1,399.00 in full of its account, and that at the same time its agent's monthly report for July 31, 1913, showed the bankrupt indebted to the Banner Electric Company in the sum of \$961.29, not including in that

sum the amount of stock on hand, which was something like \$400.00 in value.

Upon the examination Mr. Ackroyd, secretary and treasurer of the bankrupt corporation, testified, at pages 18, 19, 20 and 21, that he was the agent of petitioner, the Banner Electric [14] Works, independent of his position as a stockholder in, and an officer of the bankrupt company; that as such agent he kept in storage here in Tacoma, lamp stock of the said Banner Electric Company, and delivered from such warehouse stock to the bankrupt to be sold at retail, upon which he received a commission of 5%; that his position as such general agent was well understood by both the bankrupt corporation and the petitioner herein. Mr. Ackroyd also testified on page 23, that the stock on hand was not included in the proof of claim as filed by the claimant herein, Mr. Ackroyd further testified on page 26 of the transcript of testimony, that he held the Banner Electric Company's goods in the warehouse controlled by them. In answer to the following question, "Did you deliver the goods they were short of, or a case of goods?" He answered, "Anything they needed." Of course a lot of those lamps were required on jobs and on retail sales. "Whenever they were needed you let them have them?" Answer, "Yes." "Just as they needed?" "Yes."

The trustee in his first report, filed September 22, 1913, attaches an inventory of the lamp stock on hand in the store September 8, 1913, claimed by the Banner Electric Company at the invoice price of the value of \$619.73.

It is claimed that this lamp stock when in the store of the bankrupt for sale was kept separate and apart from the other goods in the house, and that separate accounts were kept of the sales of these goods as required in the contract between the Banner Electric Works and the bankrupt, which is in evidence as Trustee's Exhibit Number 1, but it does not appear that there was any greater degree of separation as between the Banner Electric stock and other stock than would naturally be the case with any other special line of goods. The said contract purports [15] to be one of agency and while it provides for the return of any unsold stock at any termination of the contract, whether it terminates by its own terms or from some act of the parties, yet it seems to me that its evident purpose was to enable the manufacturer to control the output of his mills and the disposition of his products, and that when his goods are put in the hands of his so-called agents for sale, that the sale is absolute so far as creditors are concerned, and that upon the termination of an agency as between the agent and the manufacturer, he could require the return of the unsold goods in accordance with his scheme of protecting and controlling his sales. The effect of this contract is to give the agent 60 days' credit, and ten days' further time in which to report sale of the goods actually disposed of, but there is nothing in the contract to prevent the said agent paying for all of the goods upon their receipt, but at the expiration of the 60 days plus 10 days the payment would constitute a sale of the goods and pass the title from the manufacturer. Section 8 of the said con-

tract provides that the agency may be terminated by notice in writing to the company in event that the agent shall be, or become insolvent.

It appears from the testimony of Mr. Ackroyd, and from the claims for unpaid salary filed by Mr. Ackroyd and the president, that their wages of \$30.00 per week was in arrears and had not been regularly paid them for quite a long period, and with other indebtedness against the bankrupt, which was well known to Mr. Ackroyd, which knowledge was sufficient to apprise the Banner Electric Company of the inability of the bankrupt to meet its obligations, but the petitioner took no steps to terminate the contract. [16]

Section 2 of the contract shows that it was the intention of the parties that the agent should have and maintain a 30 to 60 days' supply of stock as estimated by the agent, and under section 6 of the contract it was contemplated that the agent should settle every 30 days, upon the 10th of the month, and pay for all lamps that had been sold and collected for, and also to pay for the lamps that had been sold and had not been paid for for more than a month, which to my mind shows that it was expected in the making of said contract to the agency that the stock furnished the agent would be paid for by the agent within 60 days plus 10 days. This contract expires by its terms on the 8th day of July, 1913, and the adjudication in bankruptcy was had on the 14th day of August, 1913, no change having been made in the conduct of the business within that period.

It is my opinion that all of the lamp stock put into the store by the agent, Mr. Ackroyd, from the Ban-

ner Electric Company's warehouse was sold to the bankrupt, and there was no expectation or intention on the part of the said agent that any of it would be taken back by the Banner Electric Company. I think this case is similar to the case, *In re Graves & Labelle*, number 5030, decided by the Honorable Edward E. Cushman about June 27, 1913, and therefore sustained the exceptions filed by the trustee, and denied the application of the Banner Electric Company.

That the question presented on this review is: Whether or not the petitioner, the Banner Electric Company, is entitled to the possession of a certain stock of lamps now in the possession of the trustee in bankruptcy herein.

I hand up herewith for the information of the judge the following papers: [17]

1. Petition for review.
2. Order denying the application and confirming sale.
3. Petition for the delivery of the goods.
4. Objections to the confirmation of the sale.
5. Objections and exceptions of the trustee.
6. Trustee's first report.
7. Minutes of the meeting of October 11, 1913.
8. Transcript of the testimony taken September 10, 1913.
9. Transcript of the testimony taken October 15, 1913.
10. Trustee's exhibit number 1.
11. Petitioner's exhibit "A."

12. Petitioner's exhibit "B."

Dated October 18, 1913.

Respectfully submitted,

R. F. LAFFOON,

Referee in Bankruptcy.

[Endorsed]: "Filed this 18th day of Oct., 1913, 11:30 A. M. R. F. Laffoon, Referee in Bankruptcy."

"Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 18, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [18]

Order Confirming Referee's Decision.

This matter coming on on review of the Referee's decision, it is now ordered that the Referee's decision be and the same is hereby affirmed.

(January 12, 1914.) [19]

Stipulation [as to Rights of the Parties and as to Hearing and Determination of Petition for Revision by Appellate Court, etc.].

The respondent in the above-entitled cause having been served with a copy of said petition, due and legal service whereof is hereby acknowledged by said respondent, the parties hereto, by their respective solicitors, have agreed and stipulated together as follows:

IT IS AGREED AND STIPULATED that the rights of the parties hereto are determined by and rest wholly upon the writing set forth in the second paragraph of the said petition and upon the facts

found in the Referee's certificate and that said writing as therein set forth is a true and correct copy of the original between the General Electric Company and the Bankrupt Corporation, and that the same was duly executed by both parties to said writing.

IT IS FURTHER AGREED AND STIPULATED that the matter presented in said petition may be heard and determined by the Appellate Court as an interlocutory matter.

Nothing herein contained shall be held to preclude the respondent from calling in question the jurisdiction of the Appellate Court to hear and determine the question in the petition presented, either as to the subject matter thereof or as to the method adopted to present said question to said Court.

IT IS HEREBY FURTHER STIPULATED AND AGREED, that

WHEREAS, the petition for review in this matter filed in this Court on the 15th day of October, 1913, purports to be filed by "the Banner Electric Works of the General Electric Company," and is signed "Banner Electric Works of the General Electric Company, petitioner"; and

WHEREAS, the said phraseology "Banner Electric Works [20] of General Electric Company," was intended to mean that the General Electric Company filed said petition through its agent the Banner Electric Works.

NOW, THEREFORE, IT IS HEREBY AGREED, that the said petition may be considered amended so as to read, "Now comes the General Electric Company and respectfully shows," etc., and that the sig-

nature to said petition shall be considered as the signature of the General Electric Company, and the said petition shall have full force and effect as the act of the General Electric Company and be entitled in this court to the same consideration as if the said petition had been originally signed and presented by the General Electric Company.

Dated at Tacoma this 17th day of January, 1914.

FRANK H. KELLEY and

RALPH WOODS,

Attorneys for Petitioner.

WALTER M. HARVEY,

Attorney for Respondent, [21]

**Notice [of Filing of Petition for Review, etc., in
Appellate Court].**

To C. A. Brower, Trustee in Bankruptcy of the Andrus-Cushing Lighting Fixture Company, a Corporation, Bankrupt, and to Walter M. Harvey and G. C. Nolte, Esqs., His Attorneys:

You and each of you hereby are notified that on the — day of January, 1914, at twelve o'clock noon, we will file in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, a petition for review in the above-entitled cause, a copy of which petition is hereto attached as a part of this notice and that we will then ask to have the case docketed and

the necessary order made therein to have said case set down for hearing.

FRANK H. KELLEY,
RALPH WOODS,

Solicitors for Petitioner,
Suite 717-18-19 Tacoma Bldg., Tacoma, Washington.

DOLPH MALLORY,

SIMON & GEARIN,

Of Counsel for Petitioner.

We hereby accept service of the above notice this 17 day of January, 1914.

WALTER M. HARVEY,
G. C. NOLTE,

Attorneys for C. A. Brower, Trustee in Bankruptcy
of the Bankrupt Estate of Andrus-Cushing
Lighting Fixture Company, a Corporation.
[22]

Petition [for Revision].

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Now comes General Electric Company, a corporation, petitioner in the above-entitled cause, and respectfully represents to the Court:

I.

On or about August 13, 1913, the Andrus-Cushing Lighting Fixture Company, a corporation, was in possession of certain electric incandescent lamps of the value of six hundred nineteen 75/100 (\$619.75) dollars, under and by virtue of a writing then in force

and effect between the parties, and in words and figures as follows:

“APPOINTMENT OF AGENT
INCANDESCENT LAMPS.”

“The General Electric Company, a New York Corporation (hereinafter called the ‘Manufacturer’), hereby, through the General Manager of its Banner Electric Works, at Youngstown, Ohio, appoints Andrus-Cushing Ltg. Fixt. Co., Tacoma, Wash. (hereinafter called the ‘Agent’), an agent to sell for it its Banner incandescent lamps, manufactured under United States Letters Patent, of the types and classes hereinafter specified, upon the term and subject to the conditions herein set forth, and said agent hereby accepts the appointment, and agrees to comply with said terms and to perform all conditions hereof.

1. The agency hereby created shall continue for the period of one year from July 8th, 1912, unless sooner terminated as herein provided.

2. The manufacturer agrees to maintain in the custody of the Agent, to be disposed of as herein provided, a stock of its Banner Gem (metalized filament), Mazda (Tungsten) and Tantalum patented incandescent lamps; all of the lamps in such consigned stock shall be and remain the property of the Manufacturer until the lamps are sold, and the proceeds of all lamps sold shall be held for the benefit and for the account of the Manufacturer until fully accounted for as hereinafter provided. The quantity of lamps and the length of time they shall remain in stock is to be at all times determined by the

Manufacturer; but its intent is to maintain the stock on an average basis of from 30 to 60 days' supply, as estimated by the Agent. All lamps shipped hereunder by or on behalf of the Manufacturer either to the Agent or [23] upon his request during the continuance of this Agency, shall be subject to the same terms, conditions and agreements as if shipped to said stock, whether or not so specified. The Agent shall return to the Manufacturer, at any time when directed by it, all or any part of the said lamps that have not been sold, and any duly authorized representative of the Manufacturer shall have access at all times during business hours to the place or places in which said lamps are stored.

3. The Agent is hereby authorized (a) to sell to anyone, lamps from said stock in broken package quantities at broken package prices, and in standard package quantities at standard package prices, and (b) to sell lamps from said stock to any purchaser under standard forms of contract made by the Manufacturer and under which the Agent may be given, by the Manufacturer, written authority to deliver lamps at the prices fixed in said contracts, and (c) to sell, at prices on the same basis as those in standard forms of contract, lamps from said stock to any purchaser, not under contract, for the purchaser's immediate use; but sales under this subdivision (c) may be made only on written permission from the Manufacturer first obtained in each instance. All sales shall be made only at such prices and upon such terms as may be established by the Manufacturer; the present prices and terms being contained in the

schedules presented herewith, which are subject to change on written notice from the Manufacturer from time to time.

Upon all bills and invoices for lamps sold by the Agent shall appear the words: 'Agent for Banner Incandescent Lamps of General Electric Company.' The Agent has no authority to sell or transfer or in any way dispose of such lamps, except as herein expressly provided, and shall not control, or attempt to control, the prices at which any purchaser shall sell any of such lamps. The due payment to the Manufacturer for all sales made hereunder by the Agent shall be and hereby is guaranteed by said Agent.

The Agent shall conform to the educational and engineering instructions of the Manufacturer, and shall advise with and instruct prospective purchasers as to the classes and types of lamps best suited to their several requirements in order to secure a maximum illumination for a minimum expenditure, and shall conduct the business hereunder to the satisfaction of the Manufacturer.

4. All of the Agent's books and records relating to his transactions in connection with the sale and distribution of the Manufacturer's lamps shall at all times during business hours be open to the inspection of any duly authorized representative of the Manufacturer.

5. The Agent shall pay all expenses in the storage, cartage, transportation, handling and sale of lamps hereunder, and all expense incident thereto and to the accounting and collection of accounts thus

created. The Agent shall be allowed as compensation for the performance of all obligations hereunder, the difference between the amount received from the sale of the lamps and their value on the basis of a discount of 29 per cent from list prices as at the time fixed by the Manufacturer. The Manufacturer agrees that if the Agent sells, during the period of this appointment, a quantity of lamps the value of which would entitled him to a higher basis of compensation, as shown in schedules presented herewith, the Manufacturer will at once credit the Agent with an amount equal to the difference between the compensation he has been receiving and the compensation he then [24] becomes entitled to.

6. The Agent shall render to the Manufacturer, not later than the tenth of every month, a report, on forms provided by the Manufacturer, covering his sales of the Manufacturer's lamps during the preceding calendar month.

The Agent shall pay over to the Manufacturer, not later than the tenth of every month, an amount equal to the total sales value of all lamps sold hereunder, less the compensation due the Agent, for which collections have been made by the Agent during the preceding calendar month, and a further amount equal to the total sales value less the compensation due the Agent, on all lamps sold by the Agent to customers whose accounts covering such lamps are, on the first of the month, past due, according to the Manufacturer's standard terms of payment.

If reports are forwarded as provided in this clause,

and are accompanied by a remittance covering in full the lamps sold by the Agent during the preceding calendar month, whether or not such accounts have been collected, such remittance may be the total sales value of the lamps sold, less the compensation due the Agent, and less 5 per cent of the amount so arrived at, which 5 per cent shall be allowed as an additional compensation for such payment and service.

7. The Agent shall, on or before the 15th day of January and July, make and forward to the Manufacturer, a complete itemized report or inventory of all of the Manufacturer's lamps on hand at the close of business on the last day of the preceding calendar month, and shall render a similar report within 15 days after the termination or expiration of this appointment with reference to all such lamps on hand at the date of such expiration or termination. At the time for rendering each such report, the Agent shall pay to the Manufacturer the value of all lamps lost from the aforesaid stock or damaged, on the basis of list prices, less a discount of 29 per cent.

8. The Agency hereby created may be terminated by notice in writing to the Agent in the event that the Agent shall be or become insolvent or in the event of a breach by the Agent of any of the terms or conditions of this appointment. The expiration or termination of this Agency for any reason shall be without prejudice to the rights of the Manufacturer against the Agent, and immediately upon any such expiration or termination the Agent shall deliver to the Manufacturer all lamps consigned here-

under and that remain unsold and shall fully perform all obligations of the Agent that then remain unfulfilled.

This appointment is hereby signed for the General Electric Company, the Manufacturer, by the General Manager of its Banner Electric Works or his duly authorized representative located in the sales office of its said works at Youngstown, Ohio.

(Signed) N. L. NORRIS,

General Manager Banner Electric Works.

Accepted:

(Signed) ANDRUS-CUSHING LTG. FIX-
TURE CO.,

F. L. CUSHING, Tr.,

Agent."

II.

On the said August 13, 1913, said Andrus-Cushing Lighting [25] Fixture Company filed its voluntary petition in bankruptcy, and thereafter in due course C. A. Brower, respondent herein, was duly qualified as the trustee of the estate of said bankrupt corporation, and as such came into the possession of the electric lamps aforesaid.

III.

Thereafter your petitioner in due course filed its petition before the Referee in Bankruptcy for the District Court of the United States for the Western District of Washington, holding terms at Tacoma, in which said District the said bankrupt corporation was domiciled at the time of the filing of the petition in bankruptcy, wherein your petitioner, having made due proof of the writing hereinbefore set forth,

prayed that the said Referee in Bankruptcy be ordered and directed to deliver to the petitioner the possession of the electric lamps aforesaid, which matter was duly heard by the said Referee, and upon said hearing said Referee made an order in words and figures as follows:

“In the District Court of the United States for the Western Division of Washington, Southern Division.

In the Matter of ANDRUS-CUSHING LIGHTING
FIXTURE COMPANY, a Corporation,
Bankrupt.

Order Confirming Sale.

“This cause coming on regularly to be heard on the 15th day of October, 1913, at the hour of 10 o'clock A. M. of said day, pursuant to the due and regular adjournment of the creditor's meeting held on the 11th day of October, 1913, upon the report of the trustee, of the sale of personal property of the bankrupt herein, and

It further appearing to the Court that due notice was given of the time and place of said sale as required by the laws of the United States and the order of this Court, and that said sale was conducted regularly in all respects, and that at said sale J. G. Parkhurst was the highest and best bidder for the personal property of said bankrupt and bid therefore the sum of \$3,600 in cash, the said property including all of the property of said bankrupt, except the book accounts and the [26] personal property claimed by the Banner Electric Company as consigned goods, and

It further appearing to the Court, that the said J. G. Parkhurst bid for the said property claimed by the said Banner Electric Company as consigned goods, the sum of \$210.00 and that said bid was the highest and best bid therefore, and

This cause coming on further to be heard on said 15th day of October, 1913, upon the petition of the said Banner Electric Company, praying that the said consigned goods be by order of this Court turned over to the possession of said Banner Electric Company as the property of said Banner Electric Company, the Court having heard the evidence presented in support of said petition and having heard the argument of counsel and being fully advised in the premises.

IT IS HEREBY ORDERED, that said petition of the said Banner Electric Company aforesaid be and the same is hereby denied and overruled, to which order the said Banner Electric Company by its counsel duly excepted and its exception is allowed.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED, that the sale of all the personal property of said bankrupt corporation, with the exception of the book accounts and the consigned goods aforesaid to J. G. Parkhurst for the sum of \$3,600.00, be and the same is hereby ratified, approved and confirmed and the Trustee in Bankruptcy herein is hereby directed to forthwith deliver possession of said *personal* to the said John G. Parkhurst upon receiving from him the sum of \$3,600.00 in cash.

IT IS FURTHER HEREBY ORDERED that the sale of the consigned goods, claimed by the Banner Electric Company, to J. G. Parkhurst for the sum of \$210.00 be and the same is hereby ratified, approved and confirmed, but the said Trustee in Bankruptcy is hereby directed to retain possession of said goods claimed by the said Banner Electric Company for the period of five days from and after the 15th day of October, 1913, which time is hereby allowed the said Banner Electric Company to file a petition for review before the District Judge of said District.

Done in open court this 15th day of October, 1913.

R. F. LAFFOON,

Referee in Bankruptcy."

IV.

Thereafter on October 15, 1913, your petitioner duly made and filed its petition to the said District Court for a review of the order aforesaid of the Referee, and said petition and the Referee's certificate of facts found thereon coming on regularly to be heard January 12, 1914; and after due hearing said District Court made and entered its order affirming the order aforesaid of the Referee. [27]

V.

Your petitioner respectfully represents to this Court that the order of the Referee aforesaid and the order of the District aforesaid, affirming the order of the Referee, is erroneous in law, in that it deprives your petitioner of its property, the lamps aforesaid, compels your petitioner against its wish and in violation of the writing between the parties to become a creditor of the bankrupt corporation,

and applies the property aforesaid of your petitioner to the satisfaction *pro rata* of the general claims of creditors of said bankrupt corporation.

WHEREFORE, your petitioner prays that by virtue of Section 24B, Chapter 4, of the Act of July 1, 1898, and to the exercise of its superintending and advisory jurisdiction in matters of law of the proceedings of the several inferior Courts of Bankruptcy, this Court will take and consider the matter aforesaid in this petition set forth, and will reverse the orders aforesaid of the said Referee and of the said District Court, and will, by its decree, determine that the petitioner is the owner of the property aforesaid and entitled to its possession as against the bankrupt and the Trustee in Bankruptcy of the bankrupt's estate and as against the creditors of the bankrupt, and otherwise for justice as between the parties due as the equity may seem meet and right.

FRANK H. KELLEY,

RALPH WOODS,

Solicitors for Petitioner.

Suite 117-18-19 Tacoma Bldg., Tacoma, Washington.

DOLPH MALLORY,

SIMON & GEARIN,

Of Counsel for Petitioner.

(Verification.)

“Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 2, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.” [28]

Order [Allowing Petition for Revision].

The petition of the General Electric Company, a corporation, to the United States Circuit Court of Appeals for the Ninth Circuit, in which petition C. A. Brower, Trustee of the bankrupt estate, of the Andrus-Cushing Lighting Fixture Company, a corporation, appears as respondent, together with the stipulation of the solicitors of the parties, having been presented to this Court for allowance, said petition hereby is allowed.

Done in open court at Tacoma, this 2d day of February, 1914.

EDWARD E. CUSHMAN,
Judge of said Court.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 2, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [29]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

United States of America,
Western District of Washington,—ss.

I, FRANK L. CROSBY, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing and attached are a true and correct copy of the record and proceedings in the case of ANDRUS-CUSHING LIGHTING FIXTURE COMPANY, Bankrupt, No. 1398, as required by stipulation of

counsel filed in said matter, as the originals thereof appear on file in said court, at the City of Tacoma, in said District.

I hereby certify that the cost of preparing and certifying the foregoing record is the sum of Fifteen Dollars and Ninety Cents (\$15.90), which sum has been paid to me by attorneys for petitioner herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at the city of Tacoma, in said District, this fourth day of February, A. D. 1914.

[Seal]

FRANK L. CROSBY,
Clerk.

By E. C. Ellington,
Deputy Clerk.

[Endorsed]: No. 2375. United States Circuit Court of Appeals for the Ninth Circuit. General Electric Company, a Corporation, Petitioner, vs. C. A. Brower, Trustee in Bankruptcy of the Estate of Andrus-Cushing Lighting Fixture Company, a Corporation, Bankrupt, Respondent. In the Matter of Andrus-Cushing Lighting Fixture Company, a Corporation, Bankrupt. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, of

a Certain Order of the United States District Court
for the Western District of Washington, Southern
Division.

Received February 6, 1914.

F. D. MONCKTON,
Clerk.

Filed February 6, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

19

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

GENERAL ELECTRIC COMPANY,
a corporation, *Petitioner,*

VS.

C. A. BROWER, Trustee in Bank-
ruptcy of the Estate of ANDRUS-
CUSHING LIGHTING FIXTURE
COMPANY, a corporation, Bank-
rupt, *Respondent.*

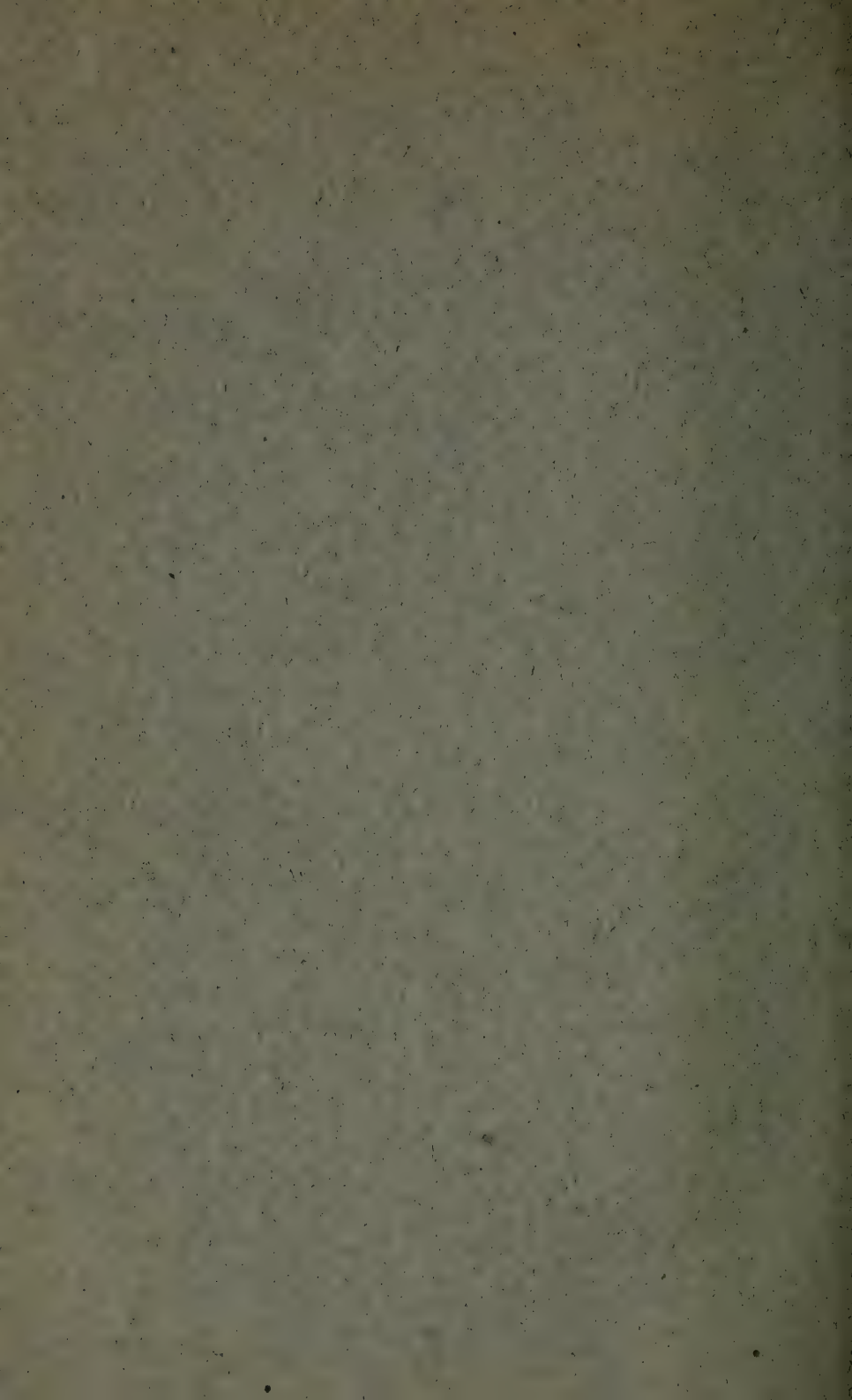
IN THE MATTER OF ANDRUS-CUSHING
LIGHTING FIXTURE COMPANY, A
CORPORATION, BANKRUPT.

PETITION FOR REVISION.

PETITIONER'S BRIEF ON MOTION TO
DISMISS AND FOR CONTINUANCE.

FRANK H. KELLEY and
RALPH WOODS,
Attorneys for Petitioner.

JOHN M. GEARIN,
Of Counsel.



No. 2375

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

GENERAL ELECTRIC COMPANY,
a corporation, *Petitioner,*

vs.

C. A. BROWER, Trustee in Bank-
ruptcy of the Estate of ANDRUS-
CUSHING LIGHTING FIXTURE
COMPANY, a corporation, Bank-
rupt, *Respondent.*

IN THE MATTER OF ANDRUS-CUSHING
LIGHTING FIXTURE COMPANY, A
CORPORATION, BANKRUPT.

PETITION FOR REVISION.

PETITIONER'S BRIEF ON RESPONDENT'S
MOTION TO DISMISS PETITION.

The remedy is by petition to revise action of court below and not by appeal. The questions presented are matters of law only, and, whether interlocutory or final, are within the purview of Sec-

tion 24, par. b of the statute. To hold the remedy by appeal alone is operative, would in effect defeat the object of the statute which is to afford a prompt administration of bankrupt estates; for it is self evident that, as in the case at bar, if the question runs to what in fact constitutes assets of the estate applicable to the payment of proved debts, the whole administration of the estate must wait the determination of this question until the time for appeal has run.

The question in the case at bar has been considered and decided on petition for revision both in this and in other circuits.

Berry Bros. vs. Snowden, 209 Fed. 336 (9th Circuit).

Beach vs. Macon Grocery Co., 120 Fed. 736 (5th Circuit).

In re Garcewich, 115 Fed. 87 (2nd Circuit).

In re Young, 111 Fed. 158 (8th Circuit).

In re Lemon & Gale Co., 112 Fed. 296 (6th Circuit).

Mueller vs. Nugent, 184 U. S. 1.

Louisville Trust Co. vs. Comingor, 184 U. S. 18.

In re Purvine, 96 Fed. 192.

The petition for revision was filed seasonably. The bankruptcy act provides no time within which

the petition must be filed. Undoubtedly the application should be made within a reasonable time, in order that the bankruptcy proceedings be not delayed; but neither the act nor any rule of court determines the time.

In re New York Economical Printing Co.,
106 Fed. 839.

In re Goode, 99 Fed. 389.

In re Pettingil Co., 137 Fed. 840.

In re Mueller, 135 Fed. 711.

In re Holmes, 142 Fed. 391.

In re Groetzinger, 127 Fed. 124.

ON MOTION FOR CONTINUANCE.

Since the questions presented by appeal and by petition for revision are similar, arising out of substantially the same transactions and facts, the appellate court should hear them together.

Ableman vs. Booth, 18 How. 470.

Bucki Lumber Co. vs. Atlantic Lb. Co., 93
Fed. 765.

Tansey vs. McDonald, 142 Mass. 220.

In re Williams, 36 Pac. 6 (Cal.). ..

The appellate court has discretion so to continue matters before it that the controversy may be settled as one and not piecemeal.

Bentley vs. Gay, 67 Ga. 667.

Wetmore vs. San Francisco, 47 Cal. 37.

Brown vs. Swann, 8 Pet. 435.

Hunter vs. Fairfax, 3 Dall. 305.

Respectfully submitted,

FRANK H. KELLEY,
RALPH WOODS,
Attorneys for Petitioner.

JOHN M. GEARIN,
Of Counsel.

2d

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

No. 2375.

GENERAL ELECTRIC COMPANY, a Corporation,
Petitioner,

against

C. A. BROWER, as Trustee of the Estate of Andrus-Cushing
Lighting Fixture Company, a Corporation, Bankrupt,
Respondent.

BRIEF ON BEHALF OF PETITIONER.

FRANK H. KELLEY,
RALPH WOODS,

Attorneys for Appellant.

CHARLES NEAVE,
JOHN M. GEARIN,
EDWARDS H. CHILDS,

Of Counsel.

Filed

NOV 2 1914

F. D. Monckton,
Clerk.

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United States Circuit Court of Appeals

FOR THE NINTH DISTRICT.

GENERAL ELECTRIC COMPANY,
a Corporation,
Petitioner,

against

C. A. BROWER, Trustee in Bank-
ruptcy of the Estate of Andrus-
Cushing Lighting Fixture Com-
pany, a Corporation, Bank-
rupt,
Respondent.

IN THE MATTER OF ANDRUS-CUSH-
ING LIGHTING FIXTURE COM-
PANY, a Corporation, Bank-
rupt.

BRIEF ON BEHALF OF PETITIONER.

Statement of the Case.

This is a petition filed under Section 24-b of the Bankruptcy Act to review a final order made by the District Court for the Western District of Washington, Southern Division, on January 12, 1914, in the matter of the bankruptcy of the Andrus-Cushing Lighting Fixture Company, a corporation.

On July 8, 1912, the Petitioner, General Electric Company, entered into a contract with the Andrus Company in which it agreed to consign incandescent lamps manufactured by it to the Andrus Company for sale by that Company on a commission basis (pp. 4-10). The parties entered upon the performance of that contract, lamps were consigned thereunder, and in the following year, on August 14, 1913, the Andrus Company, having gotten into difficulties, was adjudicated a bankrupt. At the time of the adjudication lamps which had been consigned under the contract and had not been sold were in the possession of the Andrus Company as the consignee, and they were subsequently taken by the trustee, who was appointed in the bankruptcy proceedings and who claimed the right to hold them for the benefit of creditors. Thereupon, and on October 8, 1913, the General Electric Company filed a petition in the bankruptcy proceedings claiming title to the lamps (p. 2) and on October 15, 1913, filed objections to the confirmation of a sale thereof by the trustee (p. 3). The petition and objections came on for hearing before the Referee in bankruptcy, and the trustee then contended that the contract under which the lamps had been consigned contemplated an actual sale to the Andrus Company, and that if the sale was not absolute, it was conditional and void as to creditors, because the contract was not recorded under a certain statute of the State of Washington (p. 14). The statute upon which the trustee relied (Rem. & Bal. Codes and Statutes, Sec. 3670) is as follows:

“All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, encumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's of-

rice of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides."

The Referee sustained the trustee's contention, and by an order made in open Court upon the authority of *In re Graves & Labelle*, a case decided by the District Court a short time before, denied the petition (pp. 30 to 32). The case upon which he relied, however, was subsequently reversed by this Court (*In re Graves and Berry Bros. v. Snowden*, 209 Fed. 336).

A petition for review was immediately filed, and the case was thereupon certified to Hon. Edward E. Cushman, District Judge, by certificate of the Referee, dated October 18, 1913 (pp. 14 to 20), and on January 12, 1914, the order which affirmed the decision of the Referee, and which is now before this Court for review was made by the District Court (p. 20).

The contract under consideration was not recorded under the Washington statute, and it follows that if it provided for a conditional sale of lamps to the Andrus Company, or a lease with a conditional right to purchase, the Referee and the Court below were right in denying the petition, for the statute would operate to make the sale absolute as to creditors and the trustee would succeed to their rights (Bankruptcy Act, Section 47, clause 2, sub-division a).

If, on the other hand, the contract created an agency for the sale of lamps owned by the General Electric Company, and the Andrus Company had possession as agent or factor only, for the purpose of making sales to the public, then neither its creditors nor the trustee would have any right whatever to the lamps and the trustee should have been ordered to give them up to the General Electric Company as the true owner. As this Court has recently said in *Berry Bros. v. Snowden*, 209 Fed., 336, at p. 340: "While it is true that under the amendment of the Bankruptcy Act of June 25, 1910, a

trustee in bankruptcy is vested with the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, the lien so given is a lien on the property of the bankrupts and not a lien on the property of third persons."

The controversy, then, is with respect to the title to the lamps and turns on the meaning of the contract under which they were delivered. The contract must speak for itself, and is as follows:

"APPOINTMENT OF AGENT.

"INCANDESCENT LAMPS.

"The General Electric Company, a New York corporation (hereinafter called the 'Manufacturer'), hereby, through the General Manager of its Banner Electric Works, at Youngstown, Ohio, appoints Andrus-Cushing Ltg. Fixt. Co. of Tacoma, Wash., (hereinafter called the 'Agent'), an Agent to sell for it its Banner Incandescent Lamps manufactured under United States Letters Patent, of the types and classes hereinafter specified, upon the terms and subject to the conditions herein set forth, and said Agent hereby accepts the appointment, and agrees to comply with said terms and to perform all conditions hereof.

1. The Agency hereby created shall continue for the period of one year from July 8th, 1912, unless sooner terminated as herein provided.

2. The Manufacturer agrees to maintain in the custody of the Agent, to be disposed of as herein provided, a stock of its Banner Gem (metalized filament), Mazda (Tungston) and Tantalum patented incandescent lamps; all of the lamps in such consigned stock shall be and remain the property of the Manufacturer until the lamps are sold, and the proceeds of all lamps sold shall be held for the benefit and for the account of the Manufacturer until fully accounted for as hereinafter provided. The quantity of lamps and the length of time they shall remain in stock is to be at all times determined by the Manufacturer; but its intent is to maintain the stock on an average basis of from 30 to 60 days' supply, as

estimated by the Agent. All lamps shipped hereunder by or on behalf of the Manufacturer either to the Agent or upon his request during the continuance of this Agency, shall be subject to the same terms, conditions and agreements as if shipped to said stock, whether or not so specified. The Agent shall return to the Manufacturer, at any time when directed by it, all or any part of the said lamps that have not been sold, and any duly authorized representative of the Manufacturer shall have access at all times during business hours to the place or places in which said lamps are stored.

3. The agent is hereby authorized (a) to sell to anyone, lamps from said stock in broken package quantities at broken package prices, and in standard package quantities at standard package prices, and (b) to sell lamps from said stock to any purchaser under standard forms of contract made by the Manufacturer and under which the Agent may be given, by the Manufacturer, written authority to deliver lamps at the prices fixed in said contracts, and (c) to sell, at prices on the same basis as those in standard forms of contract, lamps from said stock to any purchaser, not under contract, for the purchaser's immediate use; but sales under this subdivision (c) may be made only on written permission from the Manufacturer first obtained in each instance. All sales shall be made only at such prices and upon such terms as may be established by the Manufacturer; the present prices and terms being contained in the schedules presented herewith, which are subject to change on written notice from the Manufacturer from time to time.

Upon all bills and invoices for lamps sold by the Agent shall appear the words: 'Agent for Banner Incandescent Lamps of General Electric Company.' The Agent has no authority to sell or transfer or in any way dispose of such lamps, except as herein expressly provided, and shall not control, or attempt to control, the prices at which any purchaser shall sell any of such lamps. The due payment to the Manufacturer for all sales made hereunder by the Agent shall be and hereby is guaranteed by said Agent.

The Agent shall conform to the educational and engineering instructions of the Manufacturer, and shall advise with and instruct prospective purchasers as to the classes and types of lamps best suited to their several requirements in order to secure a maximum illumination for a minimum expenditure, and shall conduct the business hereunder to the satisfaction of the Manufacturer.

4. All of the Agent's books and records relating to his transactions in connection with the sale and distribution of the Manufacturer's lamps shall at all times during business hours be open to the inspection of any duly authorized representative of the Manufacturer.

5. The Agent shall pay all expenses in the storage, cartage, transportation, handling and sale of lamps hereunder, and all expense incident thereto and to the accounting and collection of accounts thus created. The Agent shall be allowed as compensation for the performance of all obligations hereunder, the difference between the amounts received from the sale of the lamps and their value on the basis of a discount of 29 per cent from list prices as to the time fixed by the Manufacturer. The Manufacturer agrees that if the Agent sells, during the period of this appointment, a quantity of lamps the value of which would entitle him to a higher basis of compensation, as shown in Schedules presented herewith, the Manufacturer will at once credit the Agent with an amount equal to the difference between the compensation he has been receiving and the compensation he then becomes entitled to.

6. The Agent shall render to the Manufacturer not later than the tenth of every month, a report, on forms provided by the Manufacturer, covering his sales of the Manufacturer's lamps during the preceding calendar month.

The Agent shall pay over to the Manufacturer, not later than the tenth of every month, an amount equal to the total sales value of all lamps sold hereunder, less the compensation due the Agent, for which collections have been made by the Agent during the preceding calendar month, and a further amount equal to the total sales value less the compensation due the Agent, on all lamps sold by the Agent to cus-

tomers whose accounts covering such lamps are, on the first of the month, past due, according to the Manufacturer's standard terms of payment.

If reports are forwarded as provided in this clause, and are accompanied by a remittance covering in full the lamps sold by the Agent during the preceding calendar month, whether or not such accounts have been collected, such remittance may be the total sales value of the lamps sold, less the compensation due the Agent, and less 5 per cent of the amount so arrived at, which 5 per cent shall be allowed as an additional compensation for such payment and service.

7. The Agent shall, on or before the 15th day of January and July, make and forward to the Manufacturer, on forms provided by the Manufacturer, a complete itemized report or inventory of all of the Manufacturers' lamps on hand at the close of business on the last day of the preceding calendar month, and shall render a similar report within 15 days after the termination or expiration of this appointment with reference to all such lamps on hand at the date of such expiration or termination. At the time for rendering each such report, the Agent shall pay to the Manufacturer the value of all lamps lost from the aforesaid stock or damaged, on the basis of list prices, less a discount of 29 per cent.

8. The agency hereby created may be terminated by notice in writing to the Agent in the event that the Agent shall be or become insolvent or in the event of a breach by the Agent of any of the terms or conditions of this appointment. The expiration or termination of this Agency for any reason shall be without prejudice to the rights of the Manufacturer against the Agent, and immediately upon any such expiration or termination the Agent shall deliver to the Manufacturer all lamps consigned hereunder and that remain unsold and shall fully perform all obligations of the Agent that then remain unfulfilled.

This appointment is hereby signed for the General Electric Company, the Manufacturer, by the General Manager of its Banner Electric Works or

his duly authorized representative located in the sales office of its said works at Youngstown, Ohio.

(Signed) N. L. NORRIS,

General Manager Banner Electric Works.

Accepted:

(Signed) ANDRUS-CUSHING LTG. FIX-
TURE CO.

F. L. CUSHING, Tr.,
Agent."

It was stipulated that "the rights of the parties hereto are determined by and rest wholly upon" the contract above set forth "and upon the facts found in the Referee's Certificate" (pp. 20, 21) and it appears from this certificate (pp. 16 to 18) that one Ackroyd acted for the General Electric Company in supplying the Andrus Company with lamps from a warehouse in Tacoma, and received a commission for his services, that after the contract was made he became a stockholder and an officer of the Andrus Company, that this was understood by all parties, that when the Andrus Company became financially embarrassed he knew about it, by virtue of his connection with that Company, and that the General Electric Company took no steps to terminate the contract. By the same stipulation the right to question the jurisdiction of this Court "to hear and determine the question in the petition presented" was reserved to the Respondent (p. 21).

Specification of Errors.

The Referee and the Court below erred in holding that the lamps in controversy had been sold, either absolutely or conditionally, to the Andrus Company, and in failing to hold that they were in the possession of that Company as agent or factor only. They also erred in refusing to hold that the General Electric Company was the owner of said lamps, and in refusing to direct that they be returned to that Company.

BRIEF OF THE ARGUMENT.

POINT I.

As to the jurisdiction of this Court.

The Bankruptcy Act in Section 24a provides that controversies in bankruptcy proceedings may be reviewed by appeal, and in Section 24b provides that proceedings of the courts of bankruptcy may be revised in matter of law by petition. In addition to filing this petition under Section 24b, the General Electric Company has appealed to this Court under Section 24a (case 2449), and the same question is presented in each case. It is a question of law only, and it may therefore be argued that the Court has jurisdiction of both the appeal and the petition. On the other hand, it may be argued that the question whether the remedy in a given case is by appeal or by petition depends upon the nature of the proceeding, that if it is a controversy in a bankruptcy proceeding it may be reviewed by appeal only, and that if it is a proceeding of a court of bankruptcy it may be reviewed by petition only. The question has been decided in different ways in the different circuits, but has now been settled, to a certain extent at least, by the Supreme Court in cases to which we think the attention of this Court should be called.

In *Hewit v. Berlin Machine Works*, 194 U. S., 296, and *Coder v. Arts*, 213 U. S., 223, it is expressly decided that a petition by a third party claiming title to goods in the hands of a trustee is a controversy arising in bankruptcy proceedings, reviewable by appeal under Section 24-a.

In *Coder v. Arts*, the Court said, at pages 233 and 234:

“It is therefore apparent that the mode of appeal in a given case depends upon the character of the proceeding. And the question to be solved in such

cases is, Does the case present a proceeding in bankruptcy or is it a controversy arising in bankruptcy proceedings?

A reference to the adjudications in this Court may assist in clearing the matter. *Hewit v. Berlin Machine Works*, 194 U. S., 296, is an illustration of a controversy arising in bankruptcy proceedings (Section 24a) wherein the appeal is under Section 6 of the act of March 3, 1891. In that case the Berlin Machine Works asserted title to the property in the possession of the trustee, and intervened in the bankruptcy proceedings, raising a distinct and separable issue as to the title to property in the possession of the trustee. This court, speaking through the Chief Justice, held that the case presented a controversy arising in bankruptcy proceedings appealable to the courts of appeal as other cases under Section 6 of the act of March 3, 1891."

The General Electric Company, a third party, filed its independent petition asserting title to the lamps. It "intervened in the bankruptcy proceeding, raising a distinct and separable issue as to the title to property in the possession of the trustee" and it follows that the order denying its petition may be reviewed by appeal.

As it is perfectly clear that the case may be reviewed on the appeal, the question whether, as a matter of law only is involved, it may not also be reviewed on this petition, or whether the two sections are mutually exclusive, may be of no importance, although the question should not be left without reference to *Matter of Loving*, 224 U. S., 183, where the Supreme Court held that Sections 25a and 24b of the Bankruptcy Act were mutually exclusive and by its *dictum* intimated that the same would be held with respect to Sections 24a and 24b. In that case the Court said at page 188:

"In our judgment the rule was well stated in *In re Mueller*, 135 Fed. Rep. 711, by Mr. Justice Lurton, then Circuit Judge (p. 715):

'The 'proceedings' reviewable (under section 24b) are those administrative orders and decrees in

the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under Section 25a. This would include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under 24a.' "

Up to this point we have considered the order under review as a denial of the General Electric Company's petition to reclaim only, but in addition to denying that petition, the same order confirmed the sale which had been made by the Trustee against the petitioner's objections, and this separate proceeding by the Trustee himself may well be held a proceeding of the Court of bankruptcy, reviewable under Section 24b on the authority of *First National Bank of Chicago v. Chicago Title and Trust Co.*, 198 U. S. 280.

The distinction between claims by third parties and claims by the trustee is well stated in the case of *In re M'Mahon*, C. C. A., Sixth Circuit, 147 Fed. 684, at page 689, where Judge Lurton said:

"Between *Hewit v. Berlin Machine Works* and *First National Bank of Chicago v. Chicago Title and Trust Co.*, there is this distinction: In the first case the stranger voluntarily came in and set up a claim against property in possession of the bankrupt's trustee. Very clearly that made one of those independent controversies which may arise in a bankruptcy proceeding or in any other where the *res* is in *custodia legis* and was appealable under section 24a. In the later case the same kind of issue arose, but it arose upon the application of the trustee for an order of sale and as incident to that the determination of a claim against the property held by one not a party to the proceeding. The latter is plainly held to be a 'proceeding in bankruptcy' not appealable, but reviewable in matters of law only upon an appeal to the supervisory powers of the Court of Appeals under section 24b."

And in *Coder v. Arts*, *supra*, the court said at p. 234:

“Nor is the decision in *Hewit v. Berlin Machine Works* inconsistent with *First National Bank of Chicago v. Chicago Title and Trust Co.*, 198 U. S. 280. In that case there was an attempt on the part of the trustee to invoke an adjudication as to the title to property which the District Court found not to be in the possession of the trustee, notwithstanding the petition of the trustee had averred possession” * * *.

Considering the order, then, as a confirmation of the sale made by the trustee, it may be reviewed upon this petition.

POINT II.

The contract under consideration was intended to be performed, and was in fact performed, in the State of Washington, and the legal effect thereof must therefore be determined by the law of that State.

The contract itself provided that lamps were to be consigned thereunder to the Andrus Company “of Tacoma, Washington” (p. 5), and in performance of the contract, lamps were, in fact, delivered to the Andrus Company from a warehouse in which they were stored in that City and State (p. 16). The contract, therefore, was not only intended to be performed, but was, in fact, performed in the State of Washington, and it follows that the effect thereof must be determined by the law of that State. As the Supreme Court said in *Andrews v. Pond*, 13 Pet., 64, at p. 77:

“The general principle in relation to contracts made in one place, to be executed in another, is well

settled. They are to be governed by the law of the place of performance.”

See also *Pinney v. Nelson*, 183 U. S., 144, 151.

POINT III.

Under the law of Washington title to the lamps in controversy is in the Petitioner.

The case of *Eilers Music House v. Fairbanks, et al.*, decided by the Supreme Court of Washington on July 11, 1914, and reported in the advance sheets of “Washington Decisions” issued under date of July 22, 1914, on page 287, has declared the law of that State upon the issue involved in the case at bar, for it construed a similar contract, determined the effect thereof upon the title to property, and thus laid down a rule of property which will be followed by the Federal Courts. The action was replevin and involved the question of title to a piano which had been consigned for sale. The Court said at pages 287 and 288:

“The contract which the appellant accepted, and under which the piano in question passed from the possession of the appellant, is, in substance, as follows: Goodman and Helgesen, on May 6, 1912, addressed a letter or order to the appellant, in which they say:

‘We will take from you a consignment at Seattle
* * * 100 player pianos of the Marshall & Wendall make * * * at the agreed price of \$360. f.o.b. Seattle, including player piano bench with each player, *which we agree to sell* at not less than your stock price of \$650 without having your written consent so to do * * *. We agree to order and sell exclusively for you * * *. We will keep all

goods in our hands fully insured and have policies in case of loss made payable to you and deposit such policies with you. We will pay all taxes levied on such goods as you may consign to us while the same are in our hands or possession. Our consignment account shall at no time exceed \$8,000. Instruments consigned to us shall be subject to your order after 90 days from date of shipment to us, and we also agree to pay you in cash on the first of each month interest at the rate of six per cent per annum on the billing price of all goods and instruments remaining on our hands longer than ninety days from date of shipment. We will endeavor to sell all instruments consigned to us within sixty days from the date of shipment to us, and will promptly remit to you cash or approved customers' contract notes which will always be subject to your approval with security on the instruments sold * * *. For the purpose of forming the basis upon which our compensation is to be fixed for the sale of such instruments and attending to collections or whatever else you may call upon us to do, instruments are to be invoiced to us as agents, at prices as above stated, and we agree that our compensation and commission hereunder shall be such sum or sums as we may sell said instruments for in excess of such billing * * *. We will send you a report on the first day of each and every month of all instruments remaining unsold and make prompt returns as soon as sales are made.'

The whole tenor of the instrument shows that the goods were to be consigned for sale upon commission, and that there was no conditional sale, because the contract does not create the relation of vendor and vendee.'",

and said further, at p. 290:

"The contention of respondent that the contract in question is a conditional sale within the meaning of Rem. & Bal. Code, Section 3670 (P. C. 349, Section 35), as construed in *Eisenberg v. Nichols*, 22 Wash. 70, 60 Pac. 124, 79 Am. St. 917, is not sound. The statute is that 'all conditional sales of personal property or leases thereof containing a conditional right to purchase' etc., where the property is placed in the

possession of the vendee, shall, unless a memorandum of the sale is filed for record, be absolute as to the classes therein named. The contract under review is not a contract for a conditional right to purchase, but is a mere consignment of goods by a principal to a factor to be sold upon commission."

The rule that in determining the law of a State the decisions of the State Courts will be followed, when they are such as to establish a rule of property, is well illustrated in the case of *L. C. Smith & Bro. Typewriter Co. v. Alleman*, 199 Fed., 1, which was an appeal from the District Court for the Eastern District of Pennsylvania and involved the question whether a certain contract was a bailment or a conditional sale. The case came on before Circuit Judge Gray and District Judges Bradford and Witmer. The opinion of the Court was written by Judge Witmer and it appears therefrom that both he and Judge Gray were satisfied that the contract was a bailment in the light of common law principles, as well as the Pennsylvania State cases that were cited. Judge Bradford, however, was apparently of a different opinion, for while he joined in the judgment, he did so on the sole ground that the State cases should be followed, saying at p. 6:

"I am constrained to join in the judgment of reversal solely for the reason that, the decisions of the Supreme Court of Pennsylvania having established a rule of property in force in that state on the subject of conditional sales and bailments of personal property, the federal courts are under obligation to enforce it there without regard to its soundness or unsoundness."

The rule has also been recognized in this class of cases by the Court of Appeals in the Seventh Circuit, in the case of *In re Galt*, 120 Fed., 64. That was an appeal from the District Court for the Northern District of Illinois, and the court, among other questions, considered whether a *bona fide* purchaser or an execution creditor of

a conditional vendee was protected against a claim of the vendor, and said at p. 67:

“The law of the State of Illinois with respect to conditional sales, as expounded by its supreme court, runs counter to the great weight of authority, but has become a rule of property in that state, and we are bound to observe it.”

While it is clear that the case at bar must be determined in the light of the law of Washington, and while the law of that state has been settled by its Supreme Court, there is nevertheless no conflict between the views of that Court and those of other courts throughout the country, as will appear from the authorities discussed in the following point, in which the case is argued on the merits.

POINT IV.

The law of Washington with respect to title to the lamps in controversy is right on principle and is in accord with the authorities in other jurisdictions.

In the absence of a controlling decision in the State of Washington the issues involved would be determined in the light of the principles of the common law with respect to sales and bailments, and the authorities in other jurisdictions, interpreting those principles, would be considered. The same result would be reached, for the Washington case is right, and is in accord with other cases on the subject throughout the country, both State and Federal. That a factor or commission merchant to whom goods of another have been consigned for sale is nothing more than an agent to sell, and has no title to the goods themselves, has never been questioned anywhere.

There was some question at one time, however, whether such a transaction was a bailment in view of the old definition of a bailment as the delivery of a thing to be returned, but that definition was criticised by Judge Story and other authorities as too narrow, in that it would not include factors, and it is now universally agreed that such a transaction is a bailment, and that a factor is a bailee. A contract under which goods are consigned for sale, then, may be described as an agency contract, a factorage contract, or as a contract of bailment, and these different legal descriptions of the same thing are used interchangeably by the Courts, as well as in this brief.

We are unable to conceive a legal theory upon which it can be argued that the lamps in controversy were sold to the consignee and do not know the theory or points upon which the respondent will rely. It seems clear, however, that his argument must take one of two courses: It must contend that the contract in question, by its very terms, created the relation of vendor and vendee and resulted in a sale, or, that while the contract itself created an agency for sale only, there were nevertheless facts outside the contract which showed it to be a mere cover, that the real intention of the parties was to pass title and that the so-called agent or consignee was really a vendee. We propose now to consider these two possible lines of argument. If either one of them is sustained the respondent must win. If they both fail; if the contract really creates an agency for sale and there are no facts outside thereof which show any change whatever in the relation thereby created, the petitioner must win.

A. THE CONTRACT CREATES AN AGENCY FOR SALE.

The question whether a contract is really one for the consignment of goods for sale by the consignee to

the public generally, or is a contract for the sale of goods to the consignee, has been many times before the courts and the principles in the light of which a particular case must be determined, are well settled.

There is no doubt as to what constitutes a sale. Its essential elements are everywhere the same, and the only question in a given case is whether these elements really exist.

In the case of *In re Allen*, 183 Fed., 172, the Court said, at p. 174:

“A ‘contract of sale’ is when there is an agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price, and an agreement of the latter to buy and pay the agreed price.”

In the case of *In re Columbus Buggy Co.*, C. C. A., Eighth Circuit, 143 Fed., 859, Judge Sanborn said, at p. 860:

“An agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price and an agreement of the latter to buy for and to pay the agreed price are essential elements of a contract of sale,”

and in defining a conditional sale the same Court said:

“A conditional sale is one in which the vesting of the title in the purchaser is subject to a condition precedent or in which its reversion in the seller is subject to a failure of the buyer to comply with a condition subsequent.”

A consignment of goods for sale, however, is something very different and involves no change of ownership whatever. It contemplates a sale in the future, to be made by the consignee, but is not a sale to the consignee. Title remains in the consignor, and the right of the consignee to sell and pass title to a third party is conferred by the consignor as owner and does not exist by virtue of any title in the consignee.

In I, *Mechem on Sales*, it is said in Section 43:

"Sale, further, is to be distinguished from the creation of an agency to sell. The essence of sale is, as has been seen, the transfer of the title to the goods for a price paid or to be paid. Such a transfer puts the transferee, who has procured the goods to sell again, in the attitude of an owner selling his own goods, and makes him liable to the first seller as a debtor for the price, and not, as an agent, for the proceeds of the resale. The essence of the agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal, who remains the owner of the goods and who therefore has the right to control the sale, to recall the goods and to demand and receive their *proceeds* when sold, less the agent's commission, but who has no right to a *price* for them before sale or unless sold by the agent.

Agencies to sell are very common; the most familiar types of such agents being the factor or commission merchant, and the general dealer who receives goods for sale under what is usually termed a 'consignment.' In the ordinary cases of this nature, the title to the goods remains in the consignor or principal until sale, and the factor or consignee does not become liable as a purchaser except, according to the weight of authority, when he has sold under a *del credere* commission."

The distinction between a contract of sale and an agency or factorage contract is thus perfectly clear.

The General Electric Company might well have agreed to sell its lamps to the Andrus Company and create the relation of vendor and vendee, and it might equally well have agreed to place its lamps in the hands of that Company to sell and create the relation of principal and agent. Either agreement would have been perfectly lawful and the question is, which relation did the parties intend to create? Their intention must be found in the contract and must be determined in the light of the whole instrument. As was said by the Court in *Franklin v.*

Stoughton Wagon Co., C. C. A., Eighth Circuit, 168 Fed. 857, at p. 862:

“The contract must be read in its entirety, and its construction is not to be gathered from any separate provision of it. It is from the whole contract that the intention of the parties is to be gathered.”

Each provision of the contract must be considered in the light of all other provisions, and the application of this test in the case at bar will show that the General Electric Company never parted with its title to the lamps and that the Andrus Company held them as agent or factor only.

The contract is entitled “Appointment of Agent” and in the first paragraph the Andrus Company is appointed “Agent to sell” in accordance with the terms of the contract, and the agent “accepts the appointment” and agrees to the terms (p. 5).

In the paragraph which follows, marked “1,” it is provided that the agency shall continue for a year, unless otherwise terminated, and in paragraph “2” it is agreed that the General Electric Company, as the Manufacturer or principal, will maintain a stock of lamps “in the custody of the Agent,” that “The quantity of lamps and the length of time they shall remain in stock is to be at all times determined by the Manufacturer,” that “all of the lamps in such consigned stock shall be and remain the property of the Manufacturer until the lamps are sold, and the proceeds of all lamps sold shall be held for the benefit and for the account of the Manufacturer,” (p. 5), and that “The Agent shall return to the Manufacturer, at any time when directed by it, all or any part of the said lamps that have not been sold, and any duly authorized representative of the Manufacturer shall have access at all times during business hours to the place or places in which said lamps are stored.”

In paragraph marked “3” the agent is authorized to sell at prices and on terms fixed by the manufacturer

and at such prices and on such terms only. On all bills and invoices for lamps sold he is obliged to state that he sells as "Agent." He guarantees that all lamps sold by him will be paid for, agrees to "conform to the educational and engineering instructions of the Manufacturer," to advise prospective purchasers as to the classes and types of lamps that will give them "a maximum illumination for a minimum expenditure" and to "conduct the business hereunder to the satisfaction of the Manufacturer" (pp. 6 and 7).

In paragraph "4" it is provided that the manufacturer may inspect the books and records of the agent, and in paragraph "5" the agent assumes obligations with respect to the lamps consigned, and in the same paragraph it is provided that the agent shall receive a certain commission on lamps sold by him "as compensation for the performance of all obligations hereunder."

In paragraph "6" it is provided that by the tenth of each month the agent must report the sales made during the preceding calendar month, remit the proceeds of all sales, less his compensation, and perform his guarantee of sales by also remitting for lamps sold to customers whose accounts are past due. An additional compensation is provided in case the agent performs his guarantee before the customer's accounts are due.

In paragraph "7" it is provided that the agent shall make and return complete inventories twice a year and pay for any lamps lost from the stock or damaged, at the list price less 29 per cent., and the last paragraph, "8.", provides that the contract may be terminated if the agent fails to perform on his part or becomes insolvent, and finally, that "The expiration or termination of this Agency for any reason shall be without prejudice to the rights of the Manufacturer against the Agent, and immediately upon any such expiration or termination the Agent shall deliver to the Manufacturer all lamps consigned hereunder and that remain unsold and shall

fully perform all obligations of the Agent that then remain unfulfilled.”

That is the whole contract under the “terms” of which the lamps in question were delivered to the Andrus Company. It is perfectly clear and admits of but one construction. The General Electric Company retained title and all the rights of ownership, and the Andrus Company undertook to sell the lamps as directed by the owner, to assume certain obligations commonly assumed by factors, to guarantee sales made to third parties, and thus be a *del credere* factor, and to take its pay by commission, based on the value of lamps sold, and an agency for sale was thus clearly created. As was said by the Court in *Norton & Co. v. Melick*, 97 Iowa, 564, at p. 567:

“when it is plainly and unequivocally expressed in the writing that it is an agency, and not a sale, and the title does not pass, there is no room for construction, and adjudged cases upon other contracts are of no aid in reaching a correct conclusion.”

The question of title is one of intention and is settled by the express provision of the contract that it “shall be and remain” in the General Electric Company, unless, of course, the other provisions are inconsistent, and unless, upon the whole contract, a contrary intention clearly appears. The other provisions, however, are not only in all respects consistent, but most of them show affirmatively that the parties could not have intended to pass title, for the idea of a sale is expressly negatived throughout the whole instrument, and the elements necessary to constitute a sale do not appear at all. There is no inconsistency whatever, and each provision of the contract either shows affirmatively that it was not intended to pass title, or is wholly consistent with the express declaration that title did not pass.

We propose to consider and determine the legal effect of every provision of the contract and will take up, first, those which expressly confirm the agreement that title shall remain in the General Electric Company, and, second, those relating to the obligations assumed by the agent.

I. The provision that title shall remain in the General Electric Company is expressly confirmed by the following further provisions:

It is expressly confirmed by the provision that the proceeds of sales "shall be held for the benefit of the manufacturer" for a trust is thus imposed on the proceeds and the beneficial interest of the Andrus Company therein is expressly limited to its commission.

It is also expressly confirmed by the provision under which the Andrus Company was obliged to return any part of the stock on hand at any time and to return "all lamps" on hand and not sold immediately upon the expiration and termination of the contract.

In the case of *In re Galt*, C. C. A., Seventh Circuit, 120 Fed., 64, Judge Jenkins said at p. 68:

"The real intent of the contracting parties must be ascertained from all the provisions in the agreement which express the contract, bearing in mind always that in a bailment the bailor may require the restoration of the thing bailed, and in a sale, whether absolute or conditional, there must be an agreement, express or implied, to pay the purchase price of the thing sold. The test would seem to be—Has the sender the right to compel a return of the thing sent, or has the receiver the option to pay for the thing in money?"

In the case of *John Deere Plow Co. v. M'David*, C. C. A., Eighth Circuit, 137 Fed., 802, Judge Riner said at p. 810:

“The plow company had the right, under the contract, to require the goods returned, and in this it lacks one of the necessary elements of a contract of sale, namely, to pay money, or its equivalent, for the goods delivered, with no obligation to return.”

In the case of *In re Columbus Buggy Co.*, C. C. A., Eighth Circuit, 143 Fed., 859, Judge Sanborn said at p. 861:

“The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment.”

In *Eldridge v. Benson*, 61 Mass., 483, the Court said, at p. 485:

“The leading feature of the agreement, which of itself would be quite sufficient to determine its meaning, is the right reserved to the defendant to return such portion of the books, delivered to him under the contract, as might not be disposed of by the agents. Such a stipulation is wholly inconsistent with an absolute sale of the property to the defendant, and clearly indicates the intent of the parties to have been, that the right of property should remain in the claimant. The elementary definition of a sale is the transmutation of property from one man to another; but no such change takes place, when it is agreed between parties that property may be returned to the person from whom it was received.”

A bailment is also evidenced by the provisions which give the manufacturer the right of access to the consigned stock, and the right to inspect the agent's books and records with respect to sales made therefrom and which require the agent to state that he sells as agent on all bills and invoices, to conform to all educational and engineering instructions of the manufacturer and to conduct the business of selling the manufacturer's lamps to its satisfaction. When goods are sold, this intimate control is not retained, but when they are delivered to an

agent for sale and the principal gets nothing until they are sold by the agent, such control is retained as a matter of course. It is wholly inconsistent with the idea of a sale, and is not only consistent with, but is demanded by, the conditions of a bailment for sale.

The provisions that the manufacturer alone shall determine the quantity of lamps to be consigned, and that lamps may be sold only at prices fixed by the manufacturer and subject to change, are further evidence to the same effect. They set forth a natural and consistent factorage arrangement, and would be, to say the least, most unusual terms for a contract of sale. If the contract had been to sell the lamps to the Andrus Company, it would have been obliged to purchase whatever quantity the manufacturer chose to deliver during the entire term of the contract and at whatever prices the manufacturer chose to name.

II. The obligations assumed by the Agent are consistent with the agreement that title shall not pass.

(a.) The Agent's guaranty of sales makes him a *del credere* agent and does not indicate a sale.

The contract provides that "The due payment to the Manufacturer for all sales made hereunder by the Agent shall be and hereby is guaranteed by said Agent". The only effect of this, however, is to make the Andrus Company a *del credere* agent. In *I. Clark & Skyles*, on the Law of Agency, at p. 968, it is said of such an agent: "He is said to sell on a *del credere* commission". The same authority says further on the same page:

"It may be laid down as a general rule that if a person consigns goods to another under an agreement by which the consignee is to receive them, and sell them at prices fixed by the consignor, and guar-

antee payment by the purchasers, and account to the consignor periodically for the proceeds, retaining for himself an agreed commission, the transaction is a *del credere* agency, and not a sale by the consignor to the consignee."

In *Cushman v. Snow*, 186 Mass., 169, the Court said, at p. 174:

"In such a case moreover the guaranty does not transform the essential character of the relation, for the principal retains title to the goods until sold, and then to their proceeds at least until paid to the agent."

In *The Commercial National Bank v. Heilbronner*, 108 N. Y., 439, the Court said, at p. 443:

"As factors, Vanuxem, Wharton & Co. had no title to the consigned goods. The consignor, upon a consignment of goods to be sold on commission, does not part with his title by the consignment, but he continues to be the true owner of the consigned property until sold by the consignee, and the rule is the same whether the consignee is a *del credere* factor, or is under advances for the principal, or is simply an agent for sale, assuming no responsibility except that usually appertaining to the position of an agent. (*Baker v. N. Y. Nat. Ex. Bank*, 100 N. Y. 31; *Mellich, L. J., Ex parte White*, 6 L. R. Ch. App. 403.) But a factor under advances for his principal, or who guarantees the sale, has a lien on the goods and their proceeds for his advances, and an interest in the debts arising upon sales, to protect his guaranty. He is entitled to retain possession of the goods and their proceeds, to protect his lien and to collect and sue the debts in his own name, rights of which the principal cannot deprive him except by reimbursing the advances, or in case of a *del credere* factor, by relieving him from his guaranty. (*Hudson v. Granger*, 5 Barn. & Ald., 27; *Story on Agency*, Sections 398, 407, 408, 424.) But such factors are nevertheless agents and cannot deal with the property or proceeds as their own."

In *National Bank v. Goodyear*, 90 Ga., 711, an agent for the sale of goods agreed that as soon as any goods were sold he would pay the principal therefor in cash, regardless of whether he had collected from the purchaser. The principal took the notes of the agent in lieu of cash, and the Court, in discussing this feature of the case, said, at p. 730:

“What was the effect of taking Goodyear’s notes for goods which he had sold, and for which, according to the terms of his contract, he ought to have paid in cash out of the proceeds of sale. Did this vary the contract as to goods not sold, or was anything waived as to them by the consignor, the E. & F. Co.? We think not. Surely an agent to sell does not become a purchaser of unsold goods by his principal accepting notes for the price of goods which have been sold. . . . There is no suggestion in the evidence that any of the notes taken from Goodyear covered any part of the goods which he had failed to sell. It has never been heard of as law that a principal may not settle with his agent, and take a note in lieu of cash for which the latter is liable, without breaking up the agency so far as business not yet transacted is concerned. Such an adjustment would not convert the agent into a purchaser even as to goods sold by him for and on account of his principal, much less as to those remaining unsold.”

The contract also provides that the agent shall account for all lamps sold and shall perform his guarantee. It provides that by the tenth of each month he shall remit all collections made during the preceding calendar month, less his commissions, and also for all lamps sold to customers whose accounts, on the first of the month, were past due, and that if he remits for such accounts before they are past due, he may have an additional commission. These provisions simply provide for the performance of the obligations assumed by the agent, and the only point to be considered in respect to them is that

they disclose a perfectly natural and usual method for the adjustment of accounts between a principal and his agent or factor. Nothing whatever is due from the agent until after he has sold to the public. When sales have been made he must remit the proceeds and when the accounts of his customers are "past due" he must perform his guarantee. When lamps have been sold and accounts therefor are outstanding, but not "past due", he may, but is not obliged to, perform his guarantee and earn a larger commission. No obligation or right to pay, however, arises until sales have been made, and the agent is neither required nor permitted to buy for himself.

(b.) The assumption of liability for loss and the payment of certain expenses by the Agent is not inconsistent with the relation and does not change the bailment into a sale.

The contract provides that "the agent shall pay all expenses in the storage, cartage, transportation, handling and sale of lamps hereunder, and all expenses incidental thereto and to the accounting and collection of accounts thus created" (p. 7), and it also provides that he shall be liable to the manufacturer for the value of all lamps lost or damaged (p. 9). These are obligations commonly assumed by the consignee in factorage contracts, and while they enlarge the liability imposed by the common law, they are perfectly lawful agreements and if the contract in which they appear is otherwise an agency or factorage contract, they in no way change the relation of the parties.

In *Sturm v. Boker*, 150 U. S., 312, the effect of a bailee's assumption of liability for loss was considered, and the Court said, at p. 330:

"The complainant's common law responsibility as bailee exempted him from liability for loss of the consigned goods arising from inevitable accident. A bailee may, however, enlarge his legal responsibility

by contract, express or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care—the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking.”

In *Snook v. Davis*, 6 Mich., 155, the Court construed a contract in which one Robertson agreed to conduct the business of selling goods for the plaintiff. The contract provided that the goods should “at all times”, both during transportation and while in Robertson’s possession, “be at the risk of the said Benjamin Robertson”. He thus assumed all responsibility for loss or damage to the goods, and the Court said, at p. 165:

“It is contended that the risk is an incident of ownership, and, therefore, conclusive of the ownership of the goods by Robertson; but, though a usual, it is by no means an inseparable incident—it is only so in the absence of contract to the contrary. It is perfectly competent for a clerk, bailee or any other person dealing in any way with the property of another by contract to take the risk upon himself, as Robertson did in this case.”

The same rule applies to the agent’s payment of storage, cartage, and other expenses connected with the handling and sale of lamps under the contract, for he is otherwise clearly a factor and the assumption of such obligations is consistent with and does not change that relation. It is of course true that such obligations are incidents of ownership, but the point is that they may be assumed by a person who is not the owner and that the assumption thereof by such a person does not make him the owner, and when, as in the case at bar, the relation of principal and factor is clearly established, the assumption of such obligations by the factor does not change that relation or make him a vendee. There are many authorities to this effect.

In the case of *In re Flanders*, C. C. A., Seventh Circuit, 134 Fed., 560, the Court said, at p. 562:

“The objections that ordinary invoices accompanied the shipments, that such shipments were made direct to Flanders, that the leather was sold by him in his own name, that he allowed credit upon sales, that he guaranteed sales, and that he insured in his own name, do not change the nature of the transaction. It is quite competent for a bailee by contract to enlarge his common-law liability, without converting the bailment into a sale.”

In the case of *In re Columbus Buggy Co.*, C. C. A. Eighth Circuit, 143 Fed. 859, the Court construed a contract in which the Agent undertook to bear the expense of insurance, freight, storage and handling of the consigned goods and it was held that the contract was one of bailment only and did not evidence a conditional sale.

In the case of *In re Reynolds*, 203 Fed., 162, a similar contract was construed, in which it was provided that “Said Agent shall transact all business pertaining to the sale of said wagons, and shall pay all taxes, freight, storage and other expenses on same, and keep the same fully protected from the weather, and in good order, all at the Agent’s own expense”, and it was held that the contract was a bailment for sale.

In *John Deere Plow Co. v. M’David*, 137 Fed. 802, the consignee agreed: “To pay all taxes, license, rents and all other expenses incidental to the safe keeping and sale of the goods and articles of merchandise and to waive all claims against John Deere Plow Company for such expense,” and further “to keep said goods and articles of merchandise insured for their full value, at expense of said second party in the name and for the benefit of John Deere Plow Co., in companies approved by them, and to turn over the policies to them, the said John Deere Plow Co., and in case of any neglect or failure to insure as herein provided, to become personally responsible for any loss or damage that may occur to said goods while in the custody of said second party,” and it was held that he was an agent or factor only.

In the case of *In re Galt*, 120 Fed. 65, the consignee agreed: "To receive, store, pay freight, and keep under cover, in good condition and fully insured, at his own expense, all wagons sent him, until sold or ordered away by the party of the first part, as herein provided; to pay all the taxes on wagons on hand should any assessment be made;" and it was held that he was an agent and not a vendee.

In *Franklin v. Stoughton Wagon Co.*, 168 Fed. 857, the consignee agreed: "To pay all taxes, license, rents and all other expenses incidental to the safe keeping and sale of said goods and articles of merchandise, and to waive all claims against Stoughton Wagon Co. for such expense," and further "To keep said goods and said articles of merchandise insured for their full value at the expense of said second party in the name and for the benefit of Stoughton Wagon Co., in companies provided by them, and to turn over the policies to them, the said Stoughton Wagon Co., and in case of any neglect or failure to insure as herein provided, to become personally responsible for any loss or damage that may occur to said goods while in the custody of said second party," and he was held to be an agent or factor only.

See also:

Monitor Mfg. Co. v. Jones, 96 Wis. 619;

National Bank of Augusta v. Goodyear, 90 Ga. 711;

National Cordage Co. v. Sims, 44 Neb. 148;

Milburn Mfg. Co. v. Peak, 89 Tex. 209;

The principle that a person may lawfully agree to pay expenses connected with another person's goods without thereby becoming the owner thereof, is well settled, and such agreements are often made by factors whose business it is to hold and deal with the goods of other people.

We have now considered all of the provisions of the contract and the whole case thereon,—the case on the entire contract,—is thus presented. The argument speaks for itself, and it is submitted that on the merits and on principle nothing more and nothing less is established than an agency for the sale of lamps.

B. THERE ARE NO FACTS IN THE RECORD TO INDICATE THAT THE TRUE RELATION OF THE PARTIES WAS NOT THAT EXPRESSED IN THE CONTRACT.

Of course, if the actual facts showed that the goods were really sold, then the contract would be a mere cover and a fraud. As the Supreme Court said in *Ludvigh v. American Woolen Co.*, 231 U. S. 522, at p. 528, after construing a written contract and finding that it created an agency for sale:

“It therefore follows that, if there are no other circumstances controlling the situation and establishing that this contract was a mere cover for a fraudulent or illegal purpose, there is nothing in its terms operating to transfer the title to the goods
* * * *”

There are no such “other circumstances controlling the situation” in the case at bar. The evidence is very meager, but what there is is wholly consistent with the lawful purpose disclosed by the contract. It appears that lamps were delivered to the Andrus Company from a warehouse in Tacoma by one Ackroyd, who represented the General Electric Company in making the deliveries and who received a commission for his services. It also appears that, after the contract was made, Ackroyd became a stockholder and an officer of the Andrus Company, that this was understood by all parties, that when the company became financially embarrassed he knew about it by virtue of his connection with that company, and that the General Electric Company took no steps to terminate the contract.

It is difficult to perceive the relevancy of these facts, although the failure of the General Electric Company to terminate the contract, if it may be considered, is most significant of its opinion with respect to title, for it is fair to presume that it would at once cease *selling* to a person unable to pay, while it might well continue to deal with an insolvent factor and give business to him with no risk whatever to itself.

In *M'Cullough v. Porter*, 4 Watts & Sargeant, 177, it was held that an agreement to furnish goods to an insolvent to be sold at invoice prices, the insolvent consignee to return the invoice price to the consignor, after sale, and to retain all above that sum for himself and his family, was a bailment, that it was not fraudulent as to the insolvent's creditors and that the consigned goods could not be reached by them.

In disposing of the claim that the contract involved in the American Woolen Company case, *supra*, was a mere cover the Supreme Court said at pp. 528-9:

"It is said that the Horowitzes selected the goods, whereas under the contract the Woolen Company had the right to turn over any it saw fit; but this circumstance may be readily explained for the Horowitzes were familiar with and of course interested in their own trade and more likely than anyone else to make proper selections for it, and from the sale of the goods chosen they were to make their profits.",

and further on, p. 529:

"It is urged that the goods were not kept separately, but it appears that the tags of the Woolen Company were left upon the goods and it is not shown that any creditor relied upon mismarking or misbranding. And memoranda are in evidence showing the names of certain salesmen thereon, but on these same bills it is stated that the goods were furnished under the agreement already referred to.

Against these considerations are the positive terms of the agreement, found to be free from fraud

and fairly entered into, which as we interpret them permitted goods unsold to be returned.”,

and in conclusion, at p. 530:

“We are unable to find that this contract was either actually or constructively fraudulent, and hold, as was found in the Circuit Court of Appeals, that it was what it purported to be, a consignment arrangement with the net proceeds of sales to be accounted for to the consignor and with the right to return the unsold goods. Finding no error in the decree of the Circuit Court of Appeals, the same is AFFIRMED.”

Further Authorities on the Whole Case.

The following cases in which contracts similar to that involved in the case at bar are construed and some of which have already been referred to for their bearing on particular points are submitted for their bearing upon the whole case:

In *Union Stock-Yards & Transit Co. v. Western Land & Cattle Co.*, C. C. A., Seventh Circuit, 59 Fed., 49, the facts were stated by the Court as follows:

“Hall agreed to transport the cattle to his farm at his own expense, and there feed them, that they might be profitably marketed by the cattle company. He covenanted that they should not deteriorate in flesh or condition. He bound himself to pay, at an agreed valuation, for all losses of the cattle arising from ‘death, disease, escape, theft, or any cause whatever.’ He was to employ at his own expense a herdsman selected by the cattle company. The pasturage was to extend over a period of some 14 weeks, during which time the cattle company should ship the cattle to market, or sell them in pasturage. Hall was to receive, in full compensation for his services and expenditures, all moneys realized from the sale of the cattle by the cattle company in excess of \$36.05 per head, after deducting the expenses of shipment and sale.”

It was held that the transaction constituted a bailment for sale, and Judge Jenkins, writing for the Court, said: "There is wanting here an essential element of a sale,—an agreement to pay a price." He also said at p. 53:

"It is of the essence of a contract of sale that there should be a buyer and a seller; a price to be given and taken; an agreement to pay, and an agreement to receive. 'Sale' is a word of precise legal import. 'It means, at all times, a contract between parties to give and to pass rights of property for money, which the buyer pays, or promises to pay, to the seller, for the thing bought and sold.' *Williamson v. Berry*, 8 How. 544. A conditional sale implies the delivery to the purchaser of the subject-matter, the title passing only upon the performance of a condition precedent, or becoming reinvested in the seller upon failure to perform a condition subsequent. It is not infrequently a matter of difficulty to accurately distinguish between a conditional sale and a bailment of property. The border line is somewhat obscure, at times. The difficulty must be solved by the ascertainment of the real intent of the contracting parties, as found in their agreement. There are, however, certain discriminating earmarks, so to speak, by which the two may be distinguished. It is an indelible incident to a bailment that the bailor may require restoration of the thing bailed. *Insurance Co. v. Randell*, L. R. 3 P. C. 101; *Jones, Bailm.* (3d Ed.), pp. 64, 102; 2 Kent, Comm., Section 589. If the identical thing, either in its original or in an altered form, is to be returned, it is a bailment. *Powder Co. v. Burkhardt*, 97 U. S., 116; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99. In a contract of sale there is this distinguishing test, common to an absolute and to a conditional sale: that there must be an agreement, expressed or implied, to pay the purchase price."

and in considering the effect of the provision that Hall should be liable for all losses, said:

"It would be most unfair, however, to judge the contract by a single clause disconnected from the

other stipulations contained in it. We must have regard to the entire agreement to determine the meaning of any part of it. It may well comport with a bailment of property that the bailee assumes the character of insurer of the thing bailed while it remains in his possession, and as to those disasters which he, by the exercise of care, could largely guard against, and which would be greatly promoted by his negligence. It is competent for a bailee so to enlarge his responsibility. *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99. Such a clause, read in connection with the other stipulations of the contract, may well be held a wise provision, imposing upon the bailee, in the care of the cattle while in his custody, the liability of an insurer, stimulating the exercise of care for them."

See also *Metropolitan Nat. Bank v. Benedict Co.*, C. C. A., Eighth Circuit, 74 Fed., 182.

In the case of *In re Galt*, C. C. A., Seventh Circuit, 120 Fed. 64, the facts, as well as the law, are stated in the opinion of the Court, on pages 67 and 68, as follows:

"The distinction between bailment and sale is not difficult of ascertainment, if due regard be had to the elements peculiar to each. In bailment the identical thing delivered, is to be restored. In a sale there is an agreement, express or implied, to pay money or its equivalent for the thing delivered, and there is no obligation to return. *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; *Union Stock Yards & Transit Co. v. Western Land & Cattle Co.*, 7 C. C. A. 660, 59 Fed. 49. The bailee may, however, by contract, enlarge his common-law liability without converting the bailment into a sale. The real intent of the contracting parties must be ascertained from all the provisions in the agreement which express the contract, bearing in mind always that in a bailment the bailor may require the restoration of the thing bailed, and in a sale, whether absolute or conditional, there must be an agreement express or implied, to pay the purchase price of the thing sold. The test would seem to be—Has the sender the right to compel a return of the thing sent, or has the receiver the option to pay for the thing in money?"

Carefully analyzing the agreement in hand, we think it must be held that the contract of the parties was one of bailment, and not of conditional sale. The Mitchell & Lewis Company thereby appoints Galt its agent for the sale of its manufacture in the limited territory stated, and in no other place or places; agrees to furnish the goods to the agent at 40 per cent. discount from list prices; they to be sold by him, and accounted for to the company in cash or notes of the purchaser drawn upon blanks furnished by the company, running not more than six months, with interest, and made payable to the company; their payment being guaranteed by Galt. As an inducement to making sales for cash only, an allowance of 5 per cent. on such sales is allowed by the company. All cash is to be remitted not later than the day following the sale; notes to be transmitted every 30 days. If all sales should be upon time, and the notes returned to the company should aggregate more than the prices of the wagons to be accounted for, the surplus is to be returned to Galt when and in proportion to the amount collected. He agrees to sell all wagons within twelve months from date of shipment, and upon failure so to do, at the option of the company, to (1) pay cash for wagons on hand, at the prices stated; or (2) give his note therefor; or (3) store the wagons subject to the order of the company; the ownership of all wagons furnished to remain in the company until settlement as provided; the money and effects received by Galt in the business of the agency in no case to be appropriated to his private use. Galt agrees to store and keep under cover and in good condition all wagons received; to keep them fully insured at his own expense until sold or ordered away by the company; to pay taxes upon them, if any should be assessed; and he is not to sell or assist in the sale of any other wagons than those manufactured by the company.

Applying to this contract the test stated, it is clear that here was a bailment, and not a conditional sale."

See also *In re Flanders*, C. C. A., Seventh Circuit, 134 Fed., 560.

In *John Deere Plow Co. v. M'David*, C. C. A., Eighth Circuit, 137 Fed., 802, the following contract was considered:

"This agreement, made and entered into this 15th day of September, 1903, by and between John Deere Plow Co., of Kansas City, Missouri, incorporated under the laws of the State of Missouri, party of the first part, and Hymes Buggy & Impl. Co., of Springfield, County of Greene, State of Missouri, party of the second part.

"Witnesseth, That said first party, for and in consideration of the stipulations and agreements herein contained, have this day appointed and by these presents do hereby appoint the second party as their authorized agent at Springfield, Mo., for the sale, on commission, of the consigned goods and articles of merchandise designated hereon or enumerated and described on schedules of said second party, to be attached hereto as hereinafter provided.

"The party of the first part agrees to consign to and upon the written request of the said second party, so long as said party of the first part has the goods in stock to enable it so to do, during the continuance of this contract, the goods and articles of merchandise designated hereon, or on schedules or written requests of said second party hereafter made; said schedules or written requests to set forth the net amount to be received for the goods by the party of the first part after the goods shall have been sold by said party of the second part as such agent, and the place to which to be consigned, and when said written requests or schedules properly signed by said second party are accepted by John Deere Plow Co., they shall be attached and made a part of this contract, reference being made to same on the face thereof, subject to the following conditions, agreements and obligations:

"The party of the second part agrees as follows:

"1st. To receive from the Transportation Companies, and pay all transportation charges on same, the goods and articles of merchandise consigned under terms of this contract.

"2nd. To furnish proper warehouse room for all goods and articles of merchandise consigned under terms of this contract.

“3rd. To pay all Taxes, License, Rents and all other expenses incidental to the safe keeping and sale of the goods and articles of merchandise, and to waive all claims against John Deere Plow Co., for such expense.

“4th. To keep said goods and articles of merchandise insured for their full value, at expense of said second party, in the name and for the benefit of John Deere Plow Co., in Companies approved by them, and to turn over the policies to them, the said John Deere Plow Co., and in case of any neglect or failure to insure as herein provided, to become personally responsible for any loss or damage that may occur to said goods while in the custody of said second party.

“5th. To keep samples of said goods and articles of merchandise set up in salesrooms suitable for the purpose, and to make all reasonable efforts to sell the same; and not to sell any other makes of like goods and articles of merchandise to the exclusion of those consigned under the terms of this contract.

“6th. To sell the goods and articles of merchandise consigned under this contract for enough more (that) the net amounts to be received therefor by said party of the first part, as above stated, and set opposite said goods in the said written request and schedules attached, to pay all freights, taxes, expenses, charges, compensation and commissions for the handling and selling of said goods as herein provided, and the doing of all things herein provided to be done by the party of the second part; it being mutually understood that the said net amounts set opposite said goods in the attached schedules and written requests, are the net prices at which said goods and articles of merchandise are to be consigned for sale, and are the net amounts, which said second party agrees to account for and deliver to the John Deere Plow Co., for said goods when sold, as per terms of this contract. The full charges, compensation, commission and expenses of said second party for the handling and selling of said goods as herein provided, and the doing of all things herein provided to be done by the party of the second part, to be the difference between said net amounts and the gross amounts received from the sale of said goods.

“7th. To sell all goods and articles of merchandise consigned under this contract, subject to the Manufacturer’s regular printed Warranty, and to settle all claims for breakage and defects in accordance therewith. And agrees not to part possession with any of the said goods until full and satisfactory settlement shall have been made for same by purchaser, and will not allow, under any circumstances, any of said goods to be taken away on trial before such settlement is made; and that all proceeds of such sales, whether cash, or notes, shall be kept separate and distinct from said second party’s other business.

“8th. The second party further agrees to make out and render to the said first party, on the first day of each month, and oftener if so requested, a full and complete report of all sales, made the month previous, or since the last report made; and to accompany said report with a full settlement in accordance with this contract for all goods so reported sold, said settlement to be made with cash for all sales less 5% discount for all cash, _____ months from date of same and bearing interest at _____ per cent., per annum from _____. And the second party further agrees that when purchaser's notes are given in settlement for sales made as herein provided, said notes will be on blanks furnished by John Deere Plow Co., and are to be taken only from good, prompt paying purchasers. And the second party further agrees to endorse all such notes given to said first party in the following manner, to wit:

"For value received, I or we hereby guarantee the payment of the within note at maturity or at any time thereafter, and waive demand, protest, notice of protest and non-payment.

"9th. It is further agreed and understood, that the goods and merchandise to be supplied hereunder are to be consigned simply, and that the title to and ownership of all goods and articles of merchandise consigned to said second party under the terms of this contract, and all proceeds of the sale of same, shall remain vested in said first party, and be its sole property and subject to its order, until the full amount to be received for said goods, as herein provided, shall have been received by said party of the first part.

"It is further agreed that this contract is to remain in force unless cancelled and annulled by said first party, until Oct. 1st, 1904, at which time said second party agrees if required by said first party, to return all goods remaining on hand unsold at the expiration of this contract to them at their warehouse in Kansas City, in good order and free of all freights and charges.

"This contract is not transferable and should the second party hereto sell out or otherwise dispose of his business at any time prior to its expiration, the right to declare this contract cancelled and annulled from and after the date of such sale or transfer is reserved to party of the first part, without prejudice.

"The second party hereby agrees to forward any goods received on this contract at any time, and as said John Deere Plow Co., or their authorized agents may direct, charging only actual cost of freight and drayage, collecting same from transportation company as back charges.

"It is also agreed that the contract held by John Deere Plow Co., is to be considered the original, and to be the binding agreement in case the duplicate varies from it in any particular. And that the same may be terminated at any time at the option of the John Deere Plow Co., and the goods remaining on hand unsold shall be subject to the same terms and conditions as herein provided for.

"It is understood and agreed that, in writing and printing, this paper contains the full and entire agreement between the parties hereto, and that no outside oral or written understanding with any traveling agent of John Deere Plow Co., is of any force or effect whatever." * * *

The Court, by Judge Riner, said at p. 810:

"We think it was an agency contract. It is not a contract in which the consignee can sell at any price, or on any terms he may choose, but as we understand it, it is a contract or consignment of goods to be sold on commission by the consignee, as agent for the consignor, for cash. The plow company had the right, under the contract, to require the goods returned, and in this it lacks one of the necessary ele-

ments of a contract of sale, namely, to pay money, or its equivalent, for the goods delivered, with no obligation to return."

In the case of *In re Columbus Buggy Co.*, C. C. A., Eighth Circuit, 143 Fed., 859, the Court, by Judge Sanborn, said, at p. 860:

"The material terms of this contract were that the goods should be selected from those of the Columbus Company by the Washburn Company and should be shipped and billed to it as agent by the Columbus Company at the latter's wholesale prices, that the Washburn company might sell the goods at such prices as it saw fit and that it would pay to the Columbus Company the wholesale prices less 5 per cent. discount for the goods it sold in each month by the tenth day of the succeeding month, that it would keep the property insured for the benefit of the Columbus company and would bear all expenses of freight, storage and hauling, that the contract should continue in force one year and that, unless it was renewed, the Washburn company would at its expiration return that portion of the merchandise unsold and the Columbus Company would repay the freight which had been paid upon this portion and that all the goods should be on consignment and the title should remain in the Columbus company and subject to its order until they were sold and paid for in cash. The Columbus Company properly presented to the District Court its claim for that part of the merchandise which the Washburn Company held unsold under this contract and which the trustee had taken at the time of the adjudication, and that court denied its petition upon the ground that the contract evidenced a conditional sale and was therefore voidable under the statute of Oklahoma."

* * * * *

"An agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price and an agreement of the latter to buy for and to pay the agreed price are essential elements of a contract of sale. The contract involved in this case has none of these characteristics. The power to require the

restoration of the subject of the agreement is an indelible incident of a contract of bailment.”,

and further, at p. 861:

“A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expense of insurance, freight, storage and handling and that he will hold the unsold merchandise subject to the order of the furnisher discloses a bailment for sale and does not evidence a conditional sale. It contains no agreement of the receiver to pay any agreed price for the goods. It is not, therefore, affected by a statute which renders unrecorded contracts for conditional sales voidable by creditors and purchasers. The fact that such a contract provides that the receiver of the goods may fix the selling prices and may retain the difference between the agreed prices of the accounting and the selling prices to recompense him for insurance, storage, commission and expenses does not constitute the contract an agreement of sale. It still lacks the obligation of the receiver to pay a purchase price for the goods and the obligation of the furnisher to transfer the title to him for that price.”

In *Butler Bros. Shoe Co. v. United States Rubber Co.*, C. C. A., Eighth Circuit, 156 Fed. 1, a manufacturing corporation of New Jersey made annual contracts with a corporation of Colorado engaged in the wholesale business in that state, whereby the former agreed to send from its mill and warehouse in Eastern states to the latter in Colorado, upon its orders, rubber boots, shoes, and other rubber goods during the year for sale, and the latter agreed to receive, to store, and to sell them in its name as consignee, and to pay to the former for the goods which the latter sold certain agreed prices, which were so much less than its selling prices to its customers that it secured thereby the expenses of carrying on the business and a liberal commission. The contracts provided

that the latter was appointed the agent of the former to sell the goods, that the latter should make advances when requested, that to the amount of its profits it guaranteed the sales, that the goods and their proceeds, until the latter paid the agreed prices, should be the property of the former, and that the latter assumed the risk of the receiving, storing, handling and selling. The manufacturing corporation shipped the goods as agreed. It had no office, warehouse, or place of business in Colorado, and it neither incurred nor paid any of the expenses of receiving, storing and selling the goods. The Colorado corporation ordered, received, stored, and sold the merchandise at its own expense, in consideration of the factorage secured to it by the contracts.

It was held that the agreements were factorage contracts. The Court said, at p. 5:

“The question has been exhaustively argued whether this was a contract for a conditional sale or a contract of agency. It did not evidence a conditional sale, because there was no obligation of the rubber company to transfer the title to the shoe company for an agreed price, and no obligation of the shoe company to pay an agreed price for the goods. There was no vendor or vendee named in the agreement. It was a contract of bailment for sale, not a contract of sale.”

The contract under consideration in *In re Pierce*, C. C. A., Eighth Circuit, 157 Fed. 757, provided “(a) The bankrupt should receive all implements shipped and pay the freight charges thereon, and (b) store and insure them at their full value, be liable for damages thereto and keep the company harmless from all charges. (c) in case the bankrupt failed to sell all the implements received, he should either purchase and pay for those unsold at prices fixed, or hold them subject to the order of the company for a specified period, or reship or redeliver them to the company free of freight and charges. The

bankrupt, not the company, had the choice of these alternatives. (d) The bankrupt agreed to sell upon terms specified, and not to deliver to purchasers before they fully settled by cash or note and to be responsible to the company for the regular price of any put out without settlement. (e) The bankrupt agreed to remit the company all cash received on sales, less commission, and to make settlement for all implements ordered under the contract upon the close of the selling season or whenever requested by the company. Provisions were made concerning credit to purchasers. (f) The bankrupt was to guarantee the notes of purchasers. (g) The company was to sell certain of the implements specified to no other party than the bankrupt and the bankrupt was to handle no other make nor to sell outside of designated territory. (h) The implements ordered by the bankrupt were to be sold on commission for the company and should be and remain the property of the company until sold. The proceeds were also to be the property of the company. (i) The company allowed as full commission the amount realized on all sales over and above the prices specified, the commission to be the compensation for transacting the business and fulfilling the conditions imposed. The company reserved the right to rescind the contract if the bankrupt defaulted in any of his obligations", and it was held to be a contract of bailment for sale.

Franklin v. Stoughton Wagon Co., C. C. A., Eighth Circuit, 168 Fed., 857, involved a contract similar to that considered in *John Deere Plow Co. v. M'David*, *supra*, and *In re Columbus Buggy Co.*, *supra*, and provided that the agent should "pay all freight, taxes, expenses and commissions for doing the business. The Court, by Judge Riner said at p. 860:

"The distinction between conditional sales and contracts of bailment or agency was clearly stated by Judge Sanborn of this Court in *Re Columbus Buggy Co.*, 143 Fed. 859, where the Court had under con-

sideration a contract almost identical with the contract we are now considering.”,

and further, at p. 861:

“The contract before us is not a contract in which the consignee can sell at any price or at any terms he chooses, but contains a plain provision that the goods are at all times subject to the order of the wagon company until they are sold, and we think there is no doubt about the right of the wagon company under the contract to require the goods returned.”

See also *Wood Mowing Machine Co. v. Van Story*, 171 Fed., 375.

In *Parlett v. Blake*, 188 Fed. 200, goods had been shipped to a consignee for sale under a contract which provided that the consignee should pay the expenses of insurance, storage and freight. The contract was to run to July 1, 1909, and the consignee agreed to buy and pay for all goods on hand at that time. When July 1, 1909, came, the goods on hand were sold to the consignee, but it was held that until that time he held them as agent only. The Court said, at p. 202:

“The contracts in question were primarily contracts of agency for the sale of the consignors’ goods for a period ending July 1, 1909. Goods were to be intrusted to the agent by them for sale and any that were actually sold prior to that time were the goods of the principals, and the proceeds less the commission reserved belonged to them and had to be accounted for.”

On the proposition that an agreement to buy on the termination of the contract is insufficient to make a consignee a vendee prior to that time, see also *In re Reynolds*, 203 Fed., 162.

In *Childs & Co. v. Waterloo Wagon Co.*, 37 App. Div. (N. Y.) 242, the contract was contained in the following letter:

“I hereby agree to act as agent for you, as such agent to receive all goods that I hereby, or may hereafter, order, and to hold all such goods, and all money and proceeds of the sale of the same, subject to your order, and in trust for you, to sell prior to the time designated by ‘terms,’ or as agreed, as per orders given, all goods received, and to account to you at such time for all goods so received, either in cash or satisfactory bank notes bearing interest. It being distinctly agreed that the delivery and receipt of note or notes does not, in any way, relieve me from liability as agent acting in trust for you, and to account to you for all goods and proceeds as such agent; nor shall the giving by me of any note be construed to give me title to said property until the same shall be fully paid. In part consideration hereof, it shall be obligatory upon me to protect the interest of Charles H. Childs & Co. in the foregoing referred to property from loss or damage by fire, exposure or otherwise. All orders subject to the approval of Charles H. Childs & Co., and when accepted cannot be canceled.”

The Appellate Division of the New York Supreme Court held that goods shipped under the contract were consigned for sale and affirmed the judgment appealed from, on the opinion of the Referee, who said, at p. 247:

“In my view of this case, the goods were consigned by a principal to its agent for sale on commission, the title remaining in the principal until the goods were sold by the agent in the usual course of business. The fact that the agent was to receive as commissions all he could obtain over a certain price at which the goods were consigned to him, instead of a percentage on sales, did not change the transaction to a sale of goods.”

In *Lenz v. Harrison*, 148 Ill., 598, the intermediate Appellate Court made a formal finding that certain wagons were held as agent, and this was binding on the Supreme Court if really a finding of fact. It was based on a written contract, however, and was therefore reviewed. By the terms of the contract A appointed B his

agent to sell wagons, and B agreed to store the wagons, pay the freight, taxes and all expenses, not to sell on credit except to people of undoubted solvency and then to take notes for twelve months or less at 7% on blanks furnished by A; to endorse all notes; to send cash at once on all cash sales; at end of each month send in statement and all notes taken; and if so required by A at the end of twelve months, to give a note for all wagons then remaining on hand, but this not to amount to a positive sale without said requirement. The goods were to be invoiced to B at agreed prices and upon settlement B to retain all excess over the agreed invoice price.

It was held that the clause requiring B to purchase remaining wagons, if standing alone, might indicate a sale, but that on the whole contract, it was really an agency agreement only. The Court said:

“Indeed we find nothing in the contract, when all its provisions are considered, which can properly be construed in such a manner as to make the transaction a sale.”

In *Holleman v. Bradley Fertilizer Co.*, 106 Ga. 156 the Court said at pages 158-160:

“The following is the written contract declared upon by plaintiff below in its amended petition, and which was introduced on the trial of the case * * :

‘This agreement made this 13th day of March, 1888, between Bradley Fertilizer Company of Boston, Mass., and G. T. Holleman & Son of Lamar’s Mill, Upson Co., Ga., witnesseth, that said Bradley Fertilizer Company hereby agrees to supply said G. T. Holleman & Son with a limited quantity of fertilizer for sale by them during the season of 1887 and 1888, upon following terms and conditions: The fertilizers to be delivered F. O. B. cars at Butler, Ga., viz: 12 tons Sea Fowl Guano at 26 dollars per ton 2000 lbs., which price is to be net to the Bradley Fertilizer Co., exclusive of all charges and commissions. A complete statement of the season’s sales

with a list of the purchaser's names in full is to be furnished said Bradley Fertilizer Co. by said G. T. Holleman & Son, not later than May 1, 1888. Settlement is to be made on or before May 1, 1888, for all said fertilizer sold to date of settlement by said G. T. Holleman & Son, by note or notes of said G. T. Holleman & Son maturing not later than November 15, 1888, and payable at Macon, Ga., without any expense whatever of remittance to said Bradley Fertilizer Company. The specific cash, checks, notes, liens, and other obligations received from time to time by said G. T. Holleman & Son in payment for or on account of said goods sold by them are to be so and held in trust for the Bradley Fertilizer Co. and forwarded to said Company not later than May 1st, 1888, to secure the payment of note or notes of said G. T. Holleman & Son. All checks, notes, liens, and other obligations so received are to be guaranteed by said G. T. Holleman & Son, and, if returned to or left with them for collection, are, with the proceeds, to be at all times the property of the Bradley Fertilizer Company, until the note or notes of said G. T. Holleman & Son are paid in full. Said notes of G. T. Holleman & Son must be met at maturity, and their prompt payment must not depend upon the collections of the notes or accounts of the persons who have purchased said fertilizer. Said fertilizers until sold are the property of the Bradley Fertilizer Co. and any part thereof unsold on May 1st next is to be subject to their order, but the said G. T. Holleman & Son hereby agree to keep them well sheltered and to hold the same free of all charges and storages.' * * *

1. In several of the grounds of the motion for a new trial, error is assigned on the construction of the above contract given by the judge in his charge to the jury. On this point the court charged the jury that the contract meant that Holleman & Son were the agents of the Bradley Fertilizer Company; that the contract constituted Holleman & Son agents of the company to sell a certain specific amount of guano at a certain specified price, and that, under and by virtue of the terms of that contract, title never passed out of the Bradley Fertilizer Company until it was disposed of by their

agents to the consumers. Counsel for plaintiffs in error contend that this was an erroneous construction of the contract; that the stipulations entered into between the parties constituted Holleman & Son purchasers of the goods from the company, and that, therefore, when the goods were delivered to them, title passed out of the company and vested in them. We think the court was right in its ruling upon the subject. Manifestly, under the terms of the contract, Holleman & Son were under no obligation to the company, and had incurred no liability, until they had made sale of the goods to third parties; and, until this sale was made, the title to the property remained in the company. If there were any doubt about what the real intention of the parties was under the terms of the contract down to the last sentence, that sentence clearly removed all ambiguity in stipulating that 'Said fertilizers until sold are the property of the Bradley Fertilizer Company, and any part thereof unsold on May 1st next is to be subject to their order.' "

In *Milburn Mfg. Co. v. Peak*, 89 Texas, 209, the question was whether a certain contract was "one of consignment merely, or one of sale." The court said at p. 210:

"The contract referred to in the above certificate is in substance as follows:

'This agreement between Milburn Mfg. Co., party of first part, and Hood & Co., party of the second part, witnesseth: (1) That first party agrees to manufacture and ship to second party the following described vehicles to be sold and accounted for to first party in cash or purchaser's note, as herein described, at the prices herein stated (here follows detailed description of vehicles and prices). All notes to be on blanks furnished by first party, second party to see that the blanks therein retaining a mortgage on articles sold are properly filled out and that a mortgage is thereby created, and second 'party shall have no authority to take notes not in accordance with this provision'; (2) that second party agrees to receive, store, pay freight, and keep under cover and good condition, and fully insure at their own expense, in the name and for the

benefit of first party all vehicles sent, until sold by second party or ordered away by first party as herein provided, to pay all taxes on all vehicles, to make all reasonable efforts to sell same, to settle for all vehicles sold, to make all sales and take all evidence of indebtedness therefor for and in the name of first party, to remit the cash and notes received for said vehicles to first party. All notes so transferred to be endorsed and guaranteed by second party, who agrees to take up and pay cash for all such notes as should not be paid in sixty days after maturity; second party to make no charge against first party for selling, storing or handling the vehicles, their sole commission and compensation for doing such business to be the margin or difference between the price herein stated and the prices at which said vehicles shall be sold, to be ascertained and received by first party. Second party agrees to sell all the vehicles under this contract within twelve months and in case of failure or neglect to do so 'to settle for those remaining unsold in the following manner, to-wit: At the option of first party to either give their note due in three months with ten per cent interest, payable to first party or order, or to pay cash for them at the end of three months, or to store said vehicles in good order free of charge subject to the order of first party; (3) that the ownership of all vehicles furnished under this contract or their proceeds shall remain in first party until settlements shall have been made for them by second party as herein provided, and that the money and effects received in the course of the business of this agency shall in no case or under any circumstances be appropriated to the use of the second party until such settlement is made and the compensation or commission of second party has been ascertained and set apart by first party; (4) This agreement hereby made revocable at the pleasure of first party, which reserves the right to withdraw any of the above jobs at any time; (5) This contract only applies to above goods now on hand at Fort Worth, Texas.'

The contract is quite voluminous, but we think the above is the substance of its stipulations.

A factor is one to whom goods are sent for sale on commission; the relationship between him and the consignor is that of principal and agent, the general property in the goods remaining in the consignor. If he undertakes to guarantee the payment of the debts arising through his agency, he is said to sell on a *del credere* commission. * * * At all events it is clear that his contract of guaranty is not at all inconsistent with his being a factor.
* * *

And in concluding the opinion, on page 212, the court said:

“We are therefore of opinion that Hood & Co. were merely the factors of appellants and that the instrument should be construed to be a contract of consignment and not one of sale.”

In *Monitor Mfg. Co. v. Jones*, 96 Wis. 619, the following contract was considered:

“Monitor Manufacturing Co. * * and J. A. North & Sons, * * agree and contract, to-wit: Said company hereby appoints said J. A. North & Sons as its agent or agents for the sale, on commission, of its machines, until all goods shipped under terms of this contract are sold or turned over to Monitor Manufacturing Co., which shall be done on the latter’s order.

Said J. A. North & Sons accept the agency, and agree to the conditions of this contract. Said agent or agents are to solicit for orders thoroughly in the following described territory, and in such territory only:

Fox Lake and vicinity.

Monitor Manufacturing Co. agree to furnish said agency with machines as follows, and as ordered up to October 1st, 1895, the commission to consist of amount received above the following net prices. * *

Said agent or agents desire goods ordered above to be shipped on or about Feb. 1st, 1895, *on terms, one-half six months, balance eighteen months, in farmers’ notes, with legal rate of interest if paid at*

maturity; if not so paid, interest at highest legal contract rate from April 1, next, on spring sales, and Sept. 1, next, on fall sales. Final and complete settlement for all spring sales shall be made on or before May 1, next, and for all fall sales on or before Oct. 1, next. For notes maturing first fall, or in six months, in excess of same amount due second fall, or eighteen months, acceptable to Monitor Manufacturing Co. in settlement, a discount of five per cent. will be allowed. Cash discount ten per cent. up to July 1, 1895.

All machines and their proceeds shall remain the property of the Monitor Manufacturing Co. until so settled and paid for.

Retail prices to be governed by Monitor Manufacturing Co.'s printed blank orders. On each sale one of said orders to be filled out with a true property statement, and times of payment.

Sales to be made to good and responsible parties only. All notes to be drawn to the order of Monitor Manufacturing Co. Said agent or agents agree to render at time of settlement, to Monitor Manufacturing Co., a true statement of all sales, and to have on hand the entire proceeds of each and every sale, and to deliver to Monitor Manufacturing Co. or its authorized agent, such complete proceeds, from which said company shall pay said agent or agents the commission due on sales, such payment to be pro rata in cash or notes in proportion of the commission to the net prices above given. Sales made by trade, other property than notes being received, shall be considered same as cash sales. In case notes tendered to Monitor Manufacturing Co. as proceeds of sale, do not each contain a true property statement of at least \$1,000. over and above all indebtedness and exemptions, or, in lieu of this statement, are not each secured by first mortgage, duly executed and recorded, on property of \$300 market value, said company shall not be bound to accept such notes, but the agent or agents hereby agree to accept them to apply on his or their commissions. However, be it understood that in no case shall the represented value of notes not complying with the conditions of this contract exceed agent's commission.

On any sale or sales made by said agent or agents under this contract that prove a partial or total loss by reason of the uncollectibility of notes, said agent or agents agree to pay to Monitor Manufacturing Co. fifty per cent. of the loss on such notes, payment to be made either in cash or notes acceptable to Monitor Manufacturing Co., whenever said company transfer to the agent or agents the claim or claims on which settlement by virtue of this agreement is demanded.

Said agent or agents agree to receive and pay freight on all machines shipped, taxes, insurance, and all damages sustained to the machines by their not being properly housed, on all machines carried that he or they may have ordered. If Monitor Manufacturing Co. relieve said agent or agents of any machines, said agent or agents agree to put machines aboard cars free of charge and will also pay at settlement as much as the difference between place of reshipment to the point shipped, so as to make it equal to freight from factory.

Said agent or agents to sell the machines subject to the regular warranty furnished, and not to engage in the sale of other machines of the same kind during the term of this contract. Monitor Manufacturing Co. agree to use its best efforts to ship all machines ordered, but shall not be held responsible to said agent or agents in case the demand exceed the supply.

At the request of Monitor Manufacturing Co. complete returns of all machines delivered on this contract shall IMMEDIATELY be sent to said Company.

A commission of twenty per cent. allowed on the sale of repairs, excepting rubber grain-drill tubes, which are furnished on net cash terms. All repairs to be settled for in cash.

All 12 Bar P. F. seeders sold net cash July 1, 1895, \$31.00 each.

Freight equal to Beaver Dam.

Notes in our favor turned over to agents as commission must be sent to our office for indorsement. Our road representatives have no authority to indorse notes in our name.

The court said at pages 623-624:

“The defendant’s contention is that the contracts under which the implements were placed in the hands of North & Sons were in fact contracts of conditional sale of the machines, and hence void as to all persons save the parties and those having actual notice thereof, because they were never filed in the office of the town or village clerk, as required by sec. 2317, R. S. This is the only substantial contention made, and, if it fails, the judgment must be affirmed.

Careful perusal of the contracts convinces us that they were commission contracts in legal effect, and not contracts of conditional sale. The contracts are quite similar in their terms to the contract which was under consideration in *Williams M. & R. Co. v. Raynor*, 38 Wis. 119, and which was held to be an agency or commission contract; and much that is there said applies with equal force to this case. The controlling question undoubtedly is whether the contract provides for consignments of goods to be settled for at fixed prices out of the proceeds of the goods when sold, or whether, under the terms of the contract, the alleged consignee is in fact a purchaser, and becomes liable for the goods, when sold, as a principal debtor; and these questions are to be determined not so much by the words used as by the evident intent and legal effect of the provisions. Scrutinizing the various provisions as carefully as possible, we conclude that the contract before us calls for consignments of goods to be settled for out of the proceeds of sales, and does not make the consignees purchasers of the goods.”

Weir Plow Company v. Porter, 82 Mo., 23, involved the construction of a contract, which the court summarized as follows:

“That the Weir Plow Company agrees to manufacture and furnish to the party of the second part, aboard the cars at Monmouth, Ill., on or before the 20th day of February, 1876, twenty-four wood beam cultivators, etc. Party of the first part further agrees to sell the above named implements to no other than the party of the second part, during the

year 1876, in the following territory, viz: Putnam county, Missouri. The party of the first part further agrees to pay the party of the second part \$6.40 for selling each wood or iron beam cultivator, etc. Provided, each implement is sold at respective list prices before mentioned. All notes taken for the sale of the above implements to be made payable to Weir Plow Company, or order, bearing interest, from June 1st, 1876, or from date, at the rate of ten per cent. * * * And provided further, that the party of the second part take no notes without their being signed by a resident land owner, or good and sufficient security, and guarantee their payment by indorsing them, waiving demand, notice of protest and non-payment. * * * Said party of the second part agrees to sell the aforesaid number of implements as above stipulated, to keep all moneys and notes separate and apart from individual or company business, and to remit cash due each month for each implement sold for cash, to Weir Plow Company, at Monmouth, Illinois, and be ready to settle with the party of the first part by the 1st of July next, or at any time thereafter, when the party of the first part or their authorized agent may call upon the said party of the second part.

* * * The said party of the second part (Harper) agrees to represent each implement sold for cash, by the cash, at wholesale price, and each implement sold for note by note, at retail price, and indorsed as above stipulated, such notes as the party of the first part may designate sufficient in amount to pay for all implements not paid for cash, counting \$22.75 for each wood beam cultivator, etc. The said party of the second part further agrees that should he neglect or fail to sell all of said implements by the 1st day of July, 1876, to settle for those remaining on hand by giving his note, payable to the Weir Plow Company, or order, due November 1st, 1876, or indorse and turn over farmers' notes as provided for payment of implements sold on time, as the party of the first part may elect; said notes to bear interest at ten per cent from maturity, or, if the party of the first part should so elect, to store and keep well housed, free of charge, implements unsold, subject to the order of the party of the first part.

The party of the first part reserves the right to revoke this agency and take possession of said implements and the proceeds of those sold, at any time the said party of the second part fails to discharge his duties as agent."

In holding this to be a contract of bailment only, the Court said at pages 29-30:

"It is true that the plaintiff, according to the terms of the instrument, agreed to manufacture and furnish to Mr. Harper the implements covered by it, and not to sell them to any one else in Putnam county. This language of itself could not constitute a sale to Harper, in the absence of appropriate subsequent provisions to that effect. Now it happens, that all the subsequent provisions negative the inference of a sale to Harper, and constitute him a bailee or agent for the purpose of selling the implements to others, and accounting for the proceeds upon a commission at a fixed sum for every implement sold by him. * * * The whole bailment or agency is subject to revocation upon failure of said Harper to discharge his duties as agent. I am unable to perceive how Mr. Harper, or his partner, can claim any right of property in the implements as against the company, under this contract and the evidence in the record. According to the obvious intent of the contract, the unsold implements did not vest in Harper and his partner unless the company should choose to make them vendees upon their offering their paper for the price thereof, and should not choose to order the implements on storage for the future disposition of the company.

Under the evidence the agents did not furnish their notes for the unsold implements, nor were they, or anything equivalent thereto, accepted by the company in consideration for a sale of them. On the contrary the property unsold was retained on storage for the company; and the assignee of the agents neither had or made any claim for it, as passing to him under a general assignment, which could legally pass nothing belonging to the company. There was not even a conditional sale of the unsold implements, because there was no condition within the possible

power of Harper to perform which would give him the title. Any title to be acquired by him depended upon the election of the vendor whether it would make him a vendee, by accepting his paper for the purchase money, or decline doing this and order the goods to be retained on storage for the use of the company."

In *National Cordage Company v. Sims*, 44 Neb. 148, the court said at page 153:

"The law implies a mere consignment of goods for sale upon a *del credere* commission, and not a sale thereof where the contract provides that the consignee shall receive them and return periodically to the consignor the proceeds of sales at prices charged by the latter, the consignee guarantying payment therefor."

In *The Williams Mower & Reaper Co. v. Raynor*, 38 Wis. 119, the following contract was considered:

"ARTICLES OF AGREEMENT for the season of 1874, entered into this 31st day of January, 1874, by and between the WILLIAMS MOWER & REAPER COMPANY, of the city of Syracuse, state of New York, as the first party, and W. C. RAYNOR, of the city of Milwaukee, state of Wisconsin, as the second party—WITNESSETH:

1st. The second party hereby agrees to act as agent of the first party, for the sale of 'The Williams Changeable Speed Combined Self-raking Reaper and Mower', 'The Williams Dropper', and 'The Williams Single Mower,' in the following territory: * * * and to guaranty the sale for the harvest of 1874, in the territory named above, of at least thirty-six of said Combined Selfrakers No. 1, and forty-eight of the No. 2,—of said Droppers No. 1,—Nos. 2 and 5; three Droppers and five of said Single Mowers to be hereafter shipped him by the first party, as per his shipping directions.

2d. Also to thoroughly canvass said territory, and order from time to time such further number of

machines as he shall find sales for, guarantying the sale of all machines so ordered; the first party to fill the orders so far as their supply will allow; and any of the machines so ordered remaining on hand unsold at the close of the harvest, to be settled for by note of the second party, due December 1, 1875, or a continuation of this contract until the same are disposed of and paid for, at the option of the first party—in either case to draw interest at ten per cent. per annum from July 1, 1874, instead of farmers' notes, as hereinafter provided.

3d. The second party agrees to keep properly stored under cover all machines in his care, and pay all freight and charges on the same.

4th. The second party agrees to give special assistance either in person or by competent agent, to each purchaser, to set up and start the machine, and will not deliver a machine until fully settled for.

5th. The second party guaranties that all the Combined Selfrakers shall net as follows: No. 1, one hundred and seventy dollars; No. 2, one hundred and fifty five dollars; Droppers No. 1, one hundred and fifty dollars; No. 2, one hundred and thirty-five dollars each, to the first party at their works in Syracuse, New York, in creditable farmers' notes, taken for said machines, to be due and payable at least one-half on or before December 1, 1874, and not exceeding one-half December 1, 1875, with interest at ten per cent. per annum, from July 1, 1874, and the Single Mowers eighty-five dollars each, to the first party at their works in Syracuse, New York, in creditable farmers' notes and pro rata cash, taken for said machines, to be due and payable on or before December 1, 1874, with interest at ten per cent. per annum from July 1, 1874; and on all machines sold and paid for in cash on or before October 1, 1874, and promptly remitted for as received, the first party is to allow a discount of ten dollars on each Selfraker or Dropper, and five dollars on each Single Mower so sold and remitted for. In every sale where notes are taken, the blank forms furnished by the first party to be used, payable to their order, fully filled out, and to guaranty the collection of each of said notes.

6th. The second party agrees to collect notes when returned to him for that purpose, and to obtain se-

curity for the same, if required by the first party, at his own expense.

8th. The second party agrees to receive and pay freight on all extra parts ordered by him, to keep them under cover, to sell the same for cash only, and is to be paid by the first party out of the proceeds of extra parts sold and paid for, 35 per cent.

9th. The second party agrees to keep a true and accurate account of all transactions pertaining to the business of the first party; will in no case allow the same to be mixed up with his other business; and will at any time and all times when required by first party, exhibit said accounts for inspection.

10th. The first party warrant their machines to be well made, of good material and well finished, to mow, reap and deliver the grain as well as any machine made for the same purpose.

11th. The second party agrees to render a full statement on blank forms furnished by first party, of all sales of machines and extra parts, on or before the first day of October, 1874, with full payment of any balance that may remain due to the first party, in proportion of cash and notes therein agreed. * * *

It is understood if this contract is carried out fully and faithfully on the part of W. C. Raynor, a reduction of five dollars is to be made upon each machine at the time of settlement.

For exceptional cases, when necessary to make a sale, seven per cent. interest will be allowed, instead of ten, as named in the contract. * * *

The court held that the contract created an agency for sale only, and said at pages 128-131:

“After very careful consideration of all the provisions of the contract under consideration, we have reached the conclusion that the defendant was the agent or factor of the plaintiff to sell the machines, and that the title thereto did not vest in the defendant. In other words, we conclude that the defendant held the machines, and the proceeds of the sales thereof, in a fiduciary capacity; and, the motion papers showing that he had converted or fraudulently misapplied the same, the order of arrest was properly made. * * *

We are unable to construe a contract containing the above provisions, to be a contract of sale. It does not profess to be a contract of sale; on the contrary, by its express terms, the defendant agrees to act as agent of the plaintiff for the sale of the machines within certain specified territory. The restriction of the defendant as to the length of credit he might give, and, what is perhaps more significant, the provisions that the proceeds of sales, to the extent of the stipulated prices, whether cash or notes, should be paid and delivered over to the plaintiff and that each purchaser on credit should be required to give his note payable to the order of the plaintiff, and to covenant that the title to the machine so purchased should *remain* in the plaintiff until paid for, all strongly, almost unmistakably, indicate that an agency or bailment to sell, and not a sale, was intended by the parties. To the same effect is the provision by which the defendant guarantied the sale of all machines ordered by him. If he was the absolute purchaser and owner of all machines delivered to him under the contract, the reason for inserting this provision is not apparent.

The construction we give to this contract is strengthened by the provisions in the second paragraph relating to machines not sold during the season of 1874. At its option the plaintiff could have required the defendant to give his note for the stipulated price of the unsold machines, or could have allowed them to lie over in his hands until the next season, subject to the same contract. This, we think, was an option to compel the defendant to purchase such machines absolutely, or to retain them as an agent or bailee to sell. The provision seems inconsistent with the theory that the title thereto passed to the defendant in the first instance. * * * *

It is also claimed that the provision which requires the defendant to guaranty the collection of all notes taken for machines, is an indication that a sale, and not a bailment, was intended by the parties. But this is merely what is known as a *del credere* agreement, quite usual between principals and factors, and which in no manner affects the title of the property to which it relates, or the fiduciary relation of the factor to his principal. * * * we think * *

that it is a contract by which the defendant agreed to act as agent in certain counties, and under certain restrictions, to sell machines for the plaintiff, and to pay over to the plaintiff the money and notes received by him on such sales, to the stipulated amount, the plaintiff remaining the owner of the property until sold by the defendant. * * * *”

See also:

Sturtevant Co. v. Dugan & Co., 106 Md., 587;
Balderston v. Natl. Rubber Co., 18 R. I., 338;
Nutter v. Wheeler, 2 Lowell, 346 and 18 Fed. Cas.,
 p. 497;
National Bank of Augusta v. Goodyear, 90 Ga.,
 711;
Eldridge v. Benson and Trustees, 61 Mass., 483;
Cortland Wagon Co. v. Sharvy, 52 Minn., 216;
Donnelly v. Mitchell, 119 Iowa, 432;
Lance v. Butler, 135 N. C., 419;
Norton & Co. v. Melick, 97 Iowa, 564;
Harris v. Coe, 71 Conn., 157;
Fleet v. Hertz, 201 Ill., 594;
Furst v. Commercial Bank, 117 Ga., 472;
Blood v. Palmer, 11 Me., 414;
Snook v. Davis, 6 Mich., 155;
St. Paul Harvester Co. v. Nicolin, 36 Minn., 232.

In *Sturm v. Boker*, 150 U. S., 312, a contract was considered, under which goods were consigned to be sold by the consignee “to the best advantage,” the profits to be equally divided and the goods to be shipped “free of any expense” to the consignor and if not sold, returned “free of all charges.” The goods consigned were insured by the consignee. The Court, by Mr. Justice Jackson, said at p. 326:

“It is too clear for discussion or the citation of authorities, that the contract was not a *sale* of the goods by the defendants to Sturm. The terms and conditions under which the goods were delivered to

him import only a consignment. The words 'con-sign' and 'consigned' employed in the letters were used in their commercial sense, which meant that the property was committed or entrusted to Sturn for care or sale, and did not by any express or fair implication mean the sale by the one or purchase by the other.'",

and further, at pp. 328 and 329:

"Was the contract, as claimed by counsel for the defendants, a contract of 'sale or return?' We think not. The class of contracts, known as contracts of 'sale or return,' exist where the privilege of purchase or return is not dependent upon the character or quality of the property sold, but rests entirely upon the option of the purchaser to retain or return. In this class of cases the title passes to the purchaser subject to his option to return the property within a time specified, or a reasonable time, and if, before the expiration of such time, or the exercise of the option given, the property is destroyed, even by inevitable accident, the buyer is responsible for the price.

"The true distinction is pointed out by Wells, J., in *Hunt v. Wyman*, 100 Mass., 198, 200, as follows: 'An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return.'"

* * *

"The contract in its terms and conditions meets all the requirements of a bailment. The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale. This distinction or test of a bailment is

recognized by this court in the case of *Powder Co. v. Burkhardt*, 97 U. S., 110, 116.

The agency to sell and return the proceeds, or the specific goods if not sold, stands upon precisely the same footing, and does not involve a change of title."

* * *

"The complainant's common law responsibility as bailee exempted him from liability for loss of the consigned goods arising from inevitable accident. A bailee may, however, enlarge his legal responsibility by contract, express or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care—the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking,"

In *Ludvigh v. American Woolen Co.*, 231 U. S., 522, a contract under which the Woolen Company consigned goods to the so-called Niagara Company was considered. It provided that the Niagara Company should hold and care for the goods shipped to it, sell them for the Woolen Company, and remit to that Company the amount collected, "minus, however, the difference between the price" for which it had been invoiced to the Niagara Company and the price at which it had been sold by it. The property was to be insured by the Niagara Company for the benefit of the Woolen Company. The contract further provided that the Niagara Company "does hereby guarantee the payment of all bills and accounts for merchandise, possession of which is delivered to it under this agreement", and if the bills were not paid the Niagara Company agreed "to pay . . . the invoice price of said merchandise" and acquire the "title to said merchandise, or to the proceeds thereof". The last paragraph of the contract provided as follows: "This agreement shall continue for one year. If, for any reason, this agreement terminates, all of the merchandise, possession of which is held by the party of the second part under this agreement, shall at said termination be immediately

returned to the possession of the party of the first part.” It was held that the contract was one of bailment for sale. The Court, by Mr. Justice Day, said at p. 528:

“The entire contract must be read to ascertain the purpose of the parties, and we find in clause eight, limiting the agreement to one year, the provision that if for any reason the agreement terminated all of the merchandise, the possession of which was held by the Niagara Company under the agreement, should be immediately returned to the Woolen Company. The District Court held that this agreement, sections four and five, obligated the Niagara Company to pay for each and every piece of goods delivered under the contract with it, but for the reasons we have stated we cannot agree with this construction. We find that the agreement was really one of bailment for the purpose of sale, with the right to return the unsold goods. There is nothing illegal in such contracts when made in good faith. As this court held in *Sturm v. Boker*, 150 U. S., 312, 330, an agency to sell and return the proceeds or the specific goods stands upon the same footing as a bailment where the identical article is to be returned in the same or altered form and title to the property is not changed.”

I.—In 1., *Clark & Skyles*, on the Law of Agency, the difference between contracts of sale and agency contracts is well stated, at p. 16, as follows:

“The question is: Did the consignor intend to sell the goods to the consignee, and the consignee intend to buy them himself, or did the parties intend that the consignee should take possession of the goods merely as the agent of the consignor, and sell them on his account?”

and further, commencing at p. 18:

“When the business undertaken by one party, with respect to handling and selling goods, is solely for the interest and benefit of the other, the original owner, as where it is agreed that one party shall buy

and ship goods for the sole account of another, the relation is clearly that of principal and agent. Among other features which have been held to be repugnant to the idea of an absolute sale, and to show the existence of the relation of principal and agent, are, the retention of the title and the right to possession of the goods by the consignor or original possessor; the reservation by the consignor of the right to have the goods which may remain unsold returned to him, or a reservation by the consignee of the corresponding right to return the goods remaining unsold, or to purchase them outright; stipulations or provisions for the payment by the consignor to the consignee of percentages and commissions on sales made, which are of such a character as to negative the idea that such sales were made for the direct benefit of the consignee; requirements that the goods shall be sold at prices fixed by the consignor, and that settlements shall be made on that basis; provisions that payment for the goods sold shall be guaranteed by the consignee; provisions limiting the time within which the goods shall be sold, or the credit which shall be extended to purchasers, or prescribing the mode of payment, whether in cash, or by evidences of debt, requiring the making of contracts or the taking of notes in the name of the consignor; requirements that the consignee shall keep the goods safely or keep them covered by insurance; or any other stipulations or conditions which the consignee is bound to observe, and which indicate that the consignor did not intend to transfer the property in the goods to the consignee or relinquish control of them.

It is perhaps unusual, but it is not incompatible with the notion of an agency, that the compensation of an agent to sell goods shall be the difference between the amount of purchase money received by him for goods sold and the price fixed by the principal, or that he shall have for his services all money received by him in excess of the invoice price. He may as well be compensated in this way as by the allowance of a commission upon the gross proceeds.

The breach of a contract to sell goods, and account for the same within a specified time and at fixed prices, will not convert a contract of bailment and agency into a contract of sale."

The Referee's Opinion.

In his certificate to the District Court (pp. 14 to 20) the Referee, after setting forth the proceedings, expressed his opinion of the agreement, and referring first to the point that the Andrus Company kept the Petitioner's lamps "separate and apart from the other goods in the house," said: "It does not appear that there was any greater degree of separation" between them and other stock "than would naturally be the case with any other special line of goods" (p. 17). It was, of course, quite sufficient if the lamps were kept in such a way that they could be identified and taken at any time, and what possible further separation the Referee may have had in mind does not appear.

The Referee then said at page 17: "The said contract purports to be one of agency and while it provides for the return of any unsold stock at any termination of the contract, whether it terminates by its own terms or from some act of the parties, yet it seems to me that its evident purpose was to enable the manufacturer to control the output of his mills and the disposition of his products, and that when his goods are put in the hands of his so-called agents for sale, that the sale is absolute so far as creditors are concerned, and that upon the termination of an agency as between the agent and the manufacturer, he could require the return of the unsold goods in accordance with his scheme of protecting and controlling his sales. The effect of this contract is to give the agent 60 days' credit, and ten days' further time in which to report sale of the goods actually disposed of, but there is nothing in the contract to prevent the said agent paying for all of the goods upon their receipt, but at the expiration of the 60 days plus 10 days the payment would constitute a sale of the goods and pass the title from the manufacturer."

This is a direct contradiction of the express terms of the agreement and is difficult to understand. It is

certainly clear that the failure to provide that the agent shall *not* buy is no evidence that he has agreed to buy or has a right to buy. The Referee says that goods delivered to the agent are sold, so far as creditors are concerned, yet there is no obligation upon anyone to pay for them until they have been actually sold by the agent to third parties. When the goods reach the agent's hands his duty is to take care of them, to sell them if he can, and in the meantime to hold them subject to the orders of the owner. His guarantee of sales, which makes him a *del credere* factor, is enforceable only when sales have been made, and it is the only promise to pay that the agent has made.

The Referee further said that the knowledge of Ackroyd (the person who acted for the General Electric Company in delivering lamps) of the fact that the Andrus Company was in financial difficulties was sufficient to apprise the General Electric Company "of the inability of the bankrupt to meet its obligations," and then noted that it "took no steps to terminate the contract" (p. 18). The significance of this as indicating that the General Electric Company retained title has been considered under B., *supra*.

In concluding his opinion the Referee said, at page 19: "I think this case is similar to the case, *In re Graves & Labelle*, No. 5030, decided by the Honorable Edward E. Cushman about June 27, 1913", and then said further that he "therefore sustained" the position of the trustee. This was on October 18, 1913, and in the following month, on November 25, 1913, the decision to which he referred was reversed by this Court (*Berry Bros. v. Snowden* and *In re Graves*, 209 Fed., 336). In that case certain goods had been consigned for sale, under a contract somewhat similar to the contract involved in the case at bar, and the consignee subsequently became bankrupt. The consignor filed a petition against the trustee in bankruptcy, which was denied by the District Court upon the ground that the contract contemplated a condi-

tional sale and was not recorded under the Washington statute. The decision was reversed by this Court upon the ground that the transaction "was not a sale of any kind" but was "clearly one of bailment." The principle involved in this decision governs the case at bar and requires that the order now before the Court for review be reversed. It is true that in that case the consignor paid the "freight, cartage, storage and insurance" and that in the case at bar such expenses were paid by the consignee. That difference, however, is immaterial, as such an undertaking on the part of a factor is a perfectly lawful agreement which can be and is constantly made without in any way changing the relation of the parties, as clearly appears from the authorities already considered.

The conclusion reached by the Referee is not sustained by his reasoning and the authority upon which he relied no longer exists. The District Judge wrote no opinion.

POINT V.

Title to the lamps in controversy is in the petitioner and the proceedings of the District Court should be revised accordingly.

Respectfully submitted,

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL ELECTRIC COMPANY,
a corporation, *Petitioner,*

VS.

C. A. BROWER, Trustee in Bank-
ruptcy of the Estate of ANDRUS-
CUSHING LIGHTING FIXTURE
COMPANY, a corporation, Bank-
rupt, *Respondent.*

IN THE MATTER OF ANDRUS-CUSHING
LIGHTING FIXTURE COMPANY, A
CORPORATION, BANKRUPT.

PETITION FOR REVISION

RESPONDENT'S BRIEF

WALTER M. HARVEY and
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Attorneys for Respondent.

FILED

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No. 2375.

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PETITION FOR REVISION

RESPONDENT'S BRIEF

MOTION FOR DISMISSAL.

Comes now the respondent in the above entitled action, C. A. Brower, Trustee in Bankruptcy of the estate of Andrus-Cushing Lighting Fixture Company, a corporation, Bankrupt, and moves the

Court to dismiss the petition for revision in the above entitled action upon the following grounds, to-wit:

I.

That the petitioner's remedy to review the order of the United States District Court for the Western District of Washington is by appeal and not by petition to revise.

II.

That the petition for revision in the above entitled action was not filed within the time provided by law.

ARGUMENT ON MOTION TO DISMISS

The General Electric Company, a corporation, by its petition filed in the bankruptcy court claimed to be the owner of a lamp stock in the possession of the respondent as trustee in bankruptcy, and prayed that such lamp stock be withheld from sale and delivered to the petitioner. After full hearing this petition was denied. A petition for review of said referee's order was duly presented to the United States District Court for the Western District of Washington, and upon full hearing the order of the referee in bankruptcy was affirmed. From this order affirming the decision of the referee this petition for revision is presented to this Court.

The petitioner's remedy in this case was by appeal, not by petition for review. The only case

in which such a petition to superintend and review can be prosecuted is to review a matter of law in a "proceeding in bankruptcy." The order of the referee in bankruptcy was an order made not in a "proceeding in bankruptcy," but upon a "*controversy arising in a bankruptcy proceeding.*" The petitioner, General Electric Company, was claiming an adverse interest to the trustee in bankruptcy in a certain lamp stock, and the order of the referee in bankruptcy was made upon the assertion of an adverse title and it was therefore clearly a case of a "controversy arising in a bankruptcy proceeding." An appeal would lie from the order of the United States District Court, under Section 24A of the Bankruptcy Act, and a petition to superintend and review would not lie under Section 24B for the reason that the proceedings reviewable under this section are only those administrative orders and decrees in the ordinary course of bankruptcy between the filing of the petition and the final settlement of the estate which are not made especially appealable under Sections 24A and 25A. This would include questions between the bankrupt and his creditors of an administrative character and exclude such as are appealable under Section 24A, and this section, 24B, does not extend to cases where an order is made upon a controversy between the bankrupt and those claiming adversely to him or his creditors.

In this case the petitioner is claiming title to the goods adversely to the trustee, and it is there-

fore clearly a case of a "controversy arising in the course of bankruptcy proceedings" and reviewable only upon appeal.

In re Martin, 201 Fed. 37.

In re Mueller, 135 Fed. 711, 68 C. C. A. 349.

In re First Nat'l Bank, 135 Fed. 62, 67 C. C. A. 536.

Barnes vs. Pampel, 192 Fed. 525, 113 C. C. A. 81.

Security Warehousing Company vs. Hand, 143 Fed. 32.

Hewitt vs. Berlin Machine Works, 194 United States 296, 24 Supreme Court Rep. 690, 48 Law Edition 986.

The remedies by appeal and by petition for revision are not concurrent optional remedies, but are mutually exclusive, and where a remedy by appeal is given, a petition for revision will not lie.

The petitioner in this case being given a right of appeal by Section 24A of the Bankruptcy Act, it is precluded from filing a petition for revision under Section 24B.

In re Loving, 224 United States 182, 56 Law Ed. 725.

Loveland on Bankruptcy, Second Ed., 809.

Brandenburg on Bankruptcy, Second Ed., 375.

In re Goode, 99 Fed. 389.

In re Ives, 113 Fed. 911.

In re Mueller, 135 Fed. 715.

III.

The petition for revision was not filed within the time allowed by law therefor. The time within which the petition can be filed is limited to ten days, under analogy to Section 25A of the Bankruptcy Act, as Congress intended that this petition for revision should be disposed of promptly, if not summarily.

In re Friend, 134 Fed. 778-780.

ON THE MERITS.

Without waiving our motion to dismiss, but insisting that it is well taken, we will discuss the merits of this case. It has been agreed between counsel that the matter shall be presented to this Court upon the written agreement entered into between the petitioner and the bankrupt and upon the certificate of facts found by the referee in bankruptcy. From this written agreement and from the certificate these facts appeared: The petitioner executed a written agreement with the bankrupt, by the terms of which, although the bankrupt was designated as the agent of the manufacturer, it agreed to many things which were inconsistent with the theory of bailment or with the theory that the title remained vested in the manufacturer, but entirely consistent with the theory that the relation of debtor and creditor was established. It appears from this agreement and from the findings of the referee that the bankrupt as the alleged agent

agreed to pay all the expenses of storage, cartage, transportation, insurance, taxes, delivering and sale of lamps under the agreement, and all expenses incident thereto, and to the payment and collection of accounts thus created. The goods were not kept separate and apart from the other stock of merchandise of the bankrupt, but were sold by it in the regular course of business as all other goods were sold. The money received upon the so-called consigned stock was treated as the money of the bankrupt, the same as any other funds. It was not required to keep the money separate and apart from other money belonging to the bankrupt, nor was it required to turn the money received from such sales over to the manufacturer, but to pay for the lamps so sold monthly, less 29% for making the sales, and in case the bankrupt remitted in full for all the lamps sold during the preceding month, whether it had collected for such lamps or not, it was to receive an additional 5% commission. It further appears from the certificate of the referee that the petitioner had a warehouse or depot in the City of Tacoma for storing lamps which unquestionably belonged to it, and from this depot it supplied lamps to the bankrupt as ordered or required, the same as to any other retail dealers. It is apparent from the certificate of facts found that the manufacturer treated the lamps *in this storage warehouse* as its property and delivered to the bankrupt goods from this point which it expected the bankrupt to take and pay for either at once or

as the goods were sold, and it is apparent that it never expected to take back these goods.

It further appears that the agent of the petitioner in Tacoma was S. D. Ackroyd, who at the same time was the secretary of the bankrupt corporation, and the purpose of this agreement was not to have two agents in Tacoma, one S. D. Ackroyd and the other the bankrupt corporation, but that the only real agent was to be Ackroyd, and that the purpose and object of the execution of this alleged agency agreement with the bankrupt was to enable the manufacturer to control the output of his mills and the disposition of his products and to fix the price at which the goods would be sold.

The agreement provided that the same may be terminated in the event that the Andrus-Cushing Lighting Fixture Company became insolvent. The agent of the manufacturer, Ackroyd, knew that the Andrus-Cushing Fixture Company had become insolvent, knew that the salaries of the employes were in arrears for a long period; that his own salary as secretary had not been paid, and that the other indebtedness against the bankrupt, amounting to a large sum, was long past due and unpaid, and this knowledge of the petitioner's agent was sufficient to charge it with notice of the situation, and yet the petitioner took no steps to terminate the contract. Under these facts we insist that a sale of the goods had been made to the bankrupt, and if it is to be treated as a conditional sale it was void as to creditors because not recorded within ten days after

its execution, as provided by the laws of the State of Washington.

Where goods are delivered to the seller by the manufacturer and he is allowed to place them with his stock of goods, sell and dispose of them in the ordinary course of business, handles, manages and controls them as other goods, pays the insurance, taxes, cartage, warehouse charges, and all other expenses in connection therewith, sells and disposes of said goods in the ordinary course of business and agrees to pay for such goods so disposed of, and there is neither any agreement to return the goods nor an agreement to account for the proceeds of the sales of goods as such, there is no bailment, for the essential element of bailment is lacking.

In support of our contention in this case we cite to the Court:

In re Penny and Anderson, 23 Am. Bankruptcy Rprs. 115.

Troy Wagon Works vs. Vastbinder, 12 Am. Bankruptcy Report 353, 130 Fed. 232.

In re Wood, 15 Am. Bankruptcy Rpr. 411, 140 Fed. 964.

Ludvigh vs. American Woolen Company, 23 Am. Bankruptcy Rpr. 314.

In re Priegle Paint Company, 171 Fed. 586.

We call particular attention to the case *In re Penny and Anderson*, 23 Am. B. R. 115. This case was decided in the U. S. District Court for the

Southern District of New York, in which district the decisions have been almost uniformly the same as the decisions of the courts of our circuit. In the case of *Penny and Anderson* the claimant delivered certain wines and liquors to the bankrupts, which were for consumption or sale in the ordinary course of business. A contract was taken, called a "Memorandum of Consignment," but contained a reservation of title in the vendor until full payment of the purchase price, but was silent as to the disposition of the proceeds of the sale. The goods were stored in the basement of the bankrupt's place of business and were used as required, and the court held that the transaction constituted a sale and that the title to such goods passed to the trustee. The court there said:

"The transaction in question did not create the relations of principal and factor, for a factor cannot make a profit of his agency nor a valid purchase for himself and receive a commission for his services."

"If it were claimed to be a warehousing contract it would be void against creditors because there was no change of possession, control or otherwise, nor any real separation from other goods belonging to the bankrupts. If it were claimed to be a chattel mortgage it would be void for non-filing as against the trustee. And if it were claimed to be a conditional sale it would be void as against creditors."

In that case the court cited *Re Hassam*, 18 A. B. R. 745, 153 Fed. 932, in which Judge Martin of Vermont said:

“It has been repeatedly held that when personal property is delivered to a vendee for sale or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale and is a fraud upon the creditors of the vendee.”

The tendency of our State is to prevent secret arrangements which are liable to mislead creditors, and we have strict laws requiring the filing of chattel mortgages within a certain length of time; the filing of conditional sale contracts; the registering and licensing of commission merchants; and requiring that any contract of sale where there is a condition to be performed before vesting of title in the vendee must be recorded in the place where the vendee resides, and that without such filing the transaction is voidable.

As in many cases which come up where dealings are had with persons of limited means and meagre credit, the transaction here has the appearance on its face of seeking to have the advantage of a sale, and at the same time retaining the security of a bailment. If claimant had contemplated at the time the agreement was entered into the return of the goods, it certainly would have put a provision to that effect in the contract, but we think it

clear that the only object of this agreement was to protect it in case of failure on the part of the vendees. As stated in the *Penny & Anderson* case, the transaction here did not create the relation of principal and factor, for the factor cannot make a profit of his agency nor a valid purchase for himself and receive a commission for his services. Neither can it be held to be a warehousing contract, for there was no real separation from other goods belonging to the bankrupts. Neither can it be held valid as a chattel mortgage, nor a conditional sale, on account of the failure of the claimant to file the same of record, and it cannot possibly be termed a bailment because it lacks the main element, to-wit: the agreement to return the goods at a specified time; nor is there any specific description of the property whatever.

The petitioner relies upon the case of *Berry Brothers vs. Snowden*, 209 Fed. 336, recently decided by this Court, but an examination of that case will disclose that the Court reached a conclusion upon facts essentially different from the facts in this case. In that case the Court held that the fact that the consignor agreed to and did pay the freight, cartage, storage and insurance on the goods was inconsistent with the passing of title, but the record in this case discloses that the consignee paid the insurance, taxes, freight, cartage, storage and all other expenses in connection with the handling of the goods.

We respectfully submit that the petition for re-

vision should be dismissed, or, if it is considered on its merits, that the order made by the district court should be affirmed.

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